Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself and her infant child TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

ABE LAVINE, Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Defendants-Appellees

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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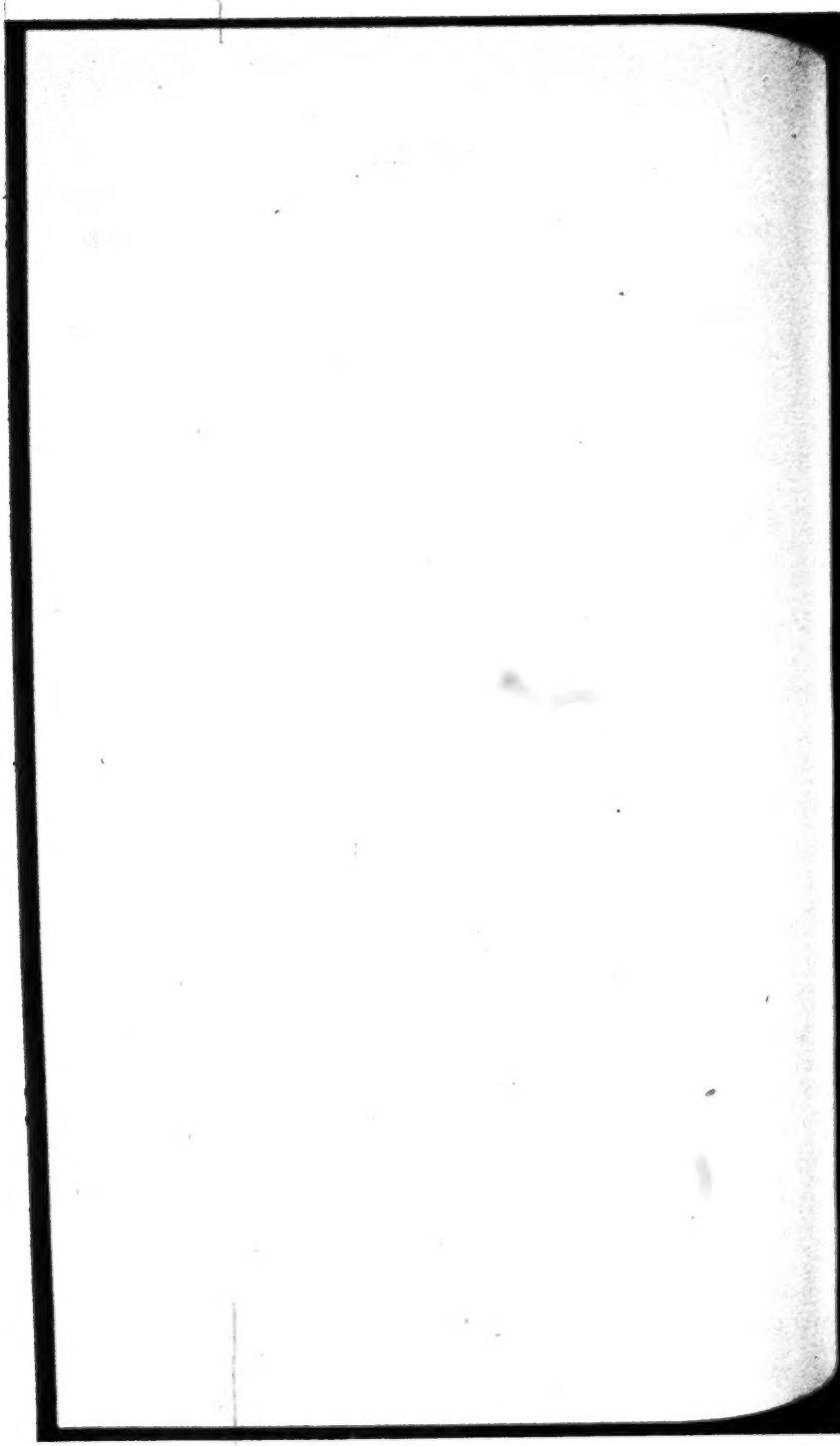

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
February 10, 1972	Plaintiffs' Complaint filed in United States District Court for the Eastern District of New York and Summons Issued
February 10, 1972	Order granting Plaintiffs Leave to Proceed in Forma Pauperis. Constantino, J.
February 17, 1972	Order to Show Cause, Ordered that Defendants Show Cause in Courtroom No. 5 on February 18, 1972 at 10:00 A.M. why a Temporary Restraining Order should not issue pending Plaintiffs' Motion for a Preliminary and Permanent Injunction. Mishler, Ch.J. filed.
February 18, 1972	Hearing on Motion for Preliminary Injunction, Temporary Restraining Order, Three-judge court, etc. Motion argued. Mishler, Ch. J. Temporary Restraining Order granted. Case set down for trial February 28, 1972.
February 18, 1972	Affidavit of JAMES N. GALLAGHER in Opposition to Motion.
February 18, 1972	Memorandum of Defendant WYMAN in Opposition to Plaintiffs' Motion.
February 18, 1972	Temporary Restraining Order, Mishler, Ch. J.
February 18, 1972	Affidavit of Service of Order to Show Cause, Summons and Complaint filed.
February 28, 1972	Trial on Statutory Claim before Mishler, Ch. J. Decision Reserved.

DATE	PROCEEDINGS
February 29, 1972	Plaintiffs' Memorandum of Law in Support of Preliminary Injunction.
February 29, 1972	Defendant WYMAN's Memorandum of Law.
March 8, 1972	Memorandum Decision. The Court declares that 18 N.Y.C.R.R. § 352.7(g)(6) contravenes the Social Security Act and regulations promulgated thereunder and a Permanent Injunction may issue.
March 10, 1972	Answer of Defendant GEORGE K. WYMAN filed.
March 15, 1972	Judgment entered March 14, 1972, filed. Ordered that action properly maintainable as a class action; that § 352.7(g)(6) of Title 18 of the N.Y.C.R.R. is declared in violation of the Social Security Act and Defendants permanently enjoined from enforcement or implementation of said regulation. Mishler, Ch. J.
March 15, 1972	Defendant GEORGE K. WYMAN'S Notice of Appeal filed.
March 15, 1972	Stenographic Transcript filed.
April 7, 1972	Appeal argued. Clark, Associate Justice, Lumbard, Senior C. J., Tyler, J.
June 5, 1972	Opinion and Order of the Court of Appeals for the Second Circuit. Order of the District Court vacated and the action is remanded for further proceedings in accordance with opinion of Court.
October 2, 1972	Plaintiffs' Motion for Leave to Permit Additional Parties to Intervene filed.

DATE	PROCEEDINGS
October 6, 1972	Plaintiffs' Motion for Leave to Intervene granted [on consent]. Hearing Re: Remand—decision reserved, Mishler, Ch. J.
October 19, 1972	Memorandum Decision declaring that 18 N.Y.C.R.R. § 352.7(g)(7) contravenes the Social Security Act and clerk directed to enter judgment forthwith enjoining defendants from attempting to recoup duplicate payment from AFDC benefits as mandated by § 352.7(g)(7). Mishler, Ch. J.
October 19, 1972	Judgment filed. Ordered, Adjudged and Decreed that 18 N.Y.C.R.R. § 352.7(g)(7) is declared to be null, void and of no effect and defendants are restrained and enjoined from enforcing and implementing said regulation.
October 20, 1972	Defendant WYMAN's Notice of Appeal filed.
November 3, 1972	Appeal argued. Friendly, Ch. J. Waterman, J., Hayes, J.
January 3, 1973	Opinion and Judgment of the Court of Appeals for the Second Circuit. Case remanded with instructions to dismiss.
March 31, 1973	Petition for Certiorari filed.
June 11, 1973	Certiorari and Leave to Proceed in Forma Pauperis granted.

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title Omitted]

72 C 182

COMPLAINT—Filed February 10, 1972

I

Plaintiffs, on behalf of themselves and all other persons similarly situated, seek a declaration that § 352.7 (g) (6) of Title 18 of the New York Code of Rules and Regulations as promulgated on August 6, 1971, effective August 6, 1971, is in violation of the Social Security Act; 42 USC § 601-610, the regulations promulgated thereunder, 45 CFR § 233.20, and of the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution.

Plaintiffs seek injunctive relief from any and all action taken under the aforesaid regulation to reduce or suspend their grants and those of other recipients of public assistance who are similarly situated.

II

PRELIMINARY STATEMENT

On August 6, 1971, the New York State Department of Social Services promulgated a new statewide regulation, § 352.7(g) (6) which for the first time provided that any "advance allowances" issued to prevent eviction for nonpayment of rent for which a grant had already been issued shall be recouped and deducted in equal amounts from the regular family assistance grant during the subsequent six months. This regulation became effective immediately on August 6, 1971 and has been applied throughout New York State to drastically reduce, over a six month period, the monthly grants for basic needs of families who have been threatened with eviction.

The said regulation is in direct conflict with the Social Security Act's requirement in the federally aided programs of Aid to Dependent Children that aid be furnished with reasonable promptness to all eligible individuals. Specifically, said regulation inflicts a punishment upon dependent children by a drastic six month reduction in their food, clothing and basic necessity allowance for acts or events beyond their control. Such a reduction is wholly inconsistent with the Social Security Act's requirement that eligibility determinations be made on the basis of need less available income and resources within the statutory assistance levels established in each state, and is a further illegal circumvention of the Social Security Act's prohibition on assumed income. The recipients who are issued a shelter grant to prevent eviction are equally needy in subsequent months but said Regulation automatically recoups the full amount regardless of how little of the subsequent basic grants remains to satisfy the family's needs.

The said Regulation further violates the Equal Protection and Due Process Clauses to the Fourteenth Amendment by discriminating irrationally and invidiously between different classes of recipients, and by imposing automatic reductions of basic needs grants without any standards. The basic subsistence grant for families who have received duplicate rent payment to prevent eviction is arbitrarily reduced or suspended for six months while all other recipients with identical basic needs receive their full monthly allotments. No basis, consistent with the purposes of the Social Security Act and relative to the existence or extent of need, exists for this discrimination. All families with defendant children are deemed by statute to be equally needy. The family that has prevented eviction is not the less needy of the essentials of living in subsequent months; yet, only the victims of threatened eviction are subjected to this drastic curtailment of subsistence benefits in violation of their right to Equal Protection of the Laws.

Further, 18 NYCRR § 352.7(g)(6) requires the automatic reduction of basic needs grant for six months without any relation to acts, consent or circumstances of each

family affected beyond having had eviction prevented by payment of rent for which a grant had already been issued. No determination is made as to the reason for or fault regarding nonpayment of rent. All families are lumped together regardless of the reason for the eviction. The lack of standards for said deduction violates the automatic reduction of basic needs grants for six months without any relation to the Fourteenth Amendment to the United States Constitution.

The harm inflicted by the automatic recoupment mandated by 18 NYCRR § 352.7(g)(6) is immediate, irreparable and devastating to families suddenly left for half a year with only a fraction of the funds needed for food, clothing, and other basic necessities.

III

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C. § 1343 in conjunction with 28 U.S.C. § 2201 and § 2202, 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

IV

THREE JUDGE COURT

1) Plaintiffs seek preliminary and permanent injunctive relief from the enforcement and operation of 18 NYCRR § 352.7(g)(6) on the grounds of the unconstitutionality of such statewide regulation.

2) Pursuant to 28 U.S.C. § 2281, a three judge statutory court should be convened to hear and determine plaintiffs' claim.

V

STATEMENT OF CLAIM

1) New York operates and administers its Aid to Dependent Children program pursuant to the requirements of the Social Security Act, 42 U.S.C. § 601 *et seq.* for

which it receives billions of dollars annually as federal reimbursement. Pursuant to required State Plan, and specifically 42 U.S.C. § 602(a)(23), New York has enacted in § 131-a of the Social Services Law a statewide standard of need for all families and a concommitant statewide schedule of monthly basic needs grants and allowances to be issued to persons determined to be needy. 18 NYCRR § 352.4. Such grants and allowances are designed to meet subsistence needs for food, clothing, furniture, household supplies, transportation and other personal expenses, but exclusive of shelter.

2) Shelter needs are met by a separately computed amount as determined by rent schedules promulgated in each local social services district pursuant to 18 NYCRR § 352.3. In all cases the rent allowance is issued in the amount of shelter expense actually paid, up to the maximums set forth in such schedules.

3) Prior to August, 1971, rent payments made to forestall eviction of families were issued as emergency assistance pursuant to § 350-j of the Social Services Law and Part 372 of the New York Code of Rules and Regulations, as required by 42 U.S.C. § 606(e)(1). Emergency assistance when issued was designed to alleviate a present crisis and no recoupment of emergency funds was required.

4) On August 6, 1971, 18 NYCRR § 352.7(g)(6) was promulgated and made effective, providing that:

> For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, and advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title.

5) Any element of choice or election by the recipients affected under said regulation is illusory and coerced.

Families are told by social service workers that the only way to prevent eviction into the streets and possible motels, a placement with its disruptive, devastating effects upon children, is to "consent" to accepting the "advance" to the subsequent six month curtailment of basic needs. Often consent is not even sought.

6) The "advance" of rent results in no further available income or resources to the recipient family since it must be paid in its entirely to the landlord in to effect its purpose of preventing eviction. No standard is used to determine the circumstances responsible for nonpayment of rent leading to hearing.

7) Families in receipt of Aid to Dependent Children, are deemed by § 131-a of the Social Services Law to have specific basic needs for food, clothing, household supplies, transportation, utilities, and other essential items and the standard of need and level of payments available to meet those needs are set uniformly for all families. Under the Social Security Act the level of assistance actually granted cannot be reduced below those uniform levels unless there is available income or resources to make up the reduction deficiency. Yet, the regulation challenged herein results in drastic reductions of assistance for six months and leaves families with a small fraction of the funds needed to survive.

8) Said reduction lowers otherwise eligible families far below their correct levels of entitlements and result in denial of eligibility to persons whose income or other resources are just below welfare standards and are now, by application of this reduced eligibility standard, above such standards.

VI

PLAINTIFFS

1(a) Plaintiffs are all citizens of the United States and reside in New York State, County of Nassau. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all individuals and families similarly aggrieved by the implementation of 18 NYCRR § 352.7

(g) (6) in violation of the Social Security Act, federal regulations and United States Constitution.

Plaintiffs are members of a class of recipients of public assistance in the Aid to Dependent Children category residing in New York State whose grants have been reduced to prevent eviction in violation of the aforesaid provisions of law.

(b) Plaintiffs bring this action as a class action because the questions of fact and law are common to the plaintiffs and the class they represent, the members of the class are so numerous as to make joinder of parties impracticable, the claims of the plaintiffs are typical of the claims of all members of the class, the plaintiffs fairly and adequately represent the claims of all the members of the class, the defendant is acting on grounds generally applicable to the entire class, the questions of law and fact common to the class predominate over any questions affecting individual members, and class action will best provide for a fair and efficient adjudication of this controversy.

2. The named plaintiffs have had their basic needs grants drastically reduced to levels ranging from nine to seventy seven percent of need:

(a) Plaintiff HAGANS and her two infant children have basic needs of $161 but will receive only $17 or 9% of such needs in February, 1972. She gradually fell behind in rent payments during 1971 because her then $165 rent allowance was $35 less than her actual rent of $200. The rent "advance" is being deducted in one month because her new housing is in Suffolk County and there will be no opportunity for recoupment after February, 1972, since she will then be receiving assistance from Suffolk County.

(b) Plaintiff GRISSETT and her five children had stolen their full August 1, 1971 public assistance check including the August rent of $250. The theft is undisputed. When plaintiff GRISSETT was sued for nonpayment of that rent in December, 1971, the local agency summarily issued the rent to prevent eviction and automatically deducted in advance the $250, pro-rated over six months, or $41.33 from each monthly grant.

(c) Plaintiff ZAVESENCE and her two infant children, effective February 1, 1972, are suffering a reduction of $83.38 from their usual basic needs grant of $161, leaving only $77.65 for the family's basic needs, or 40% of the statutory need level of $161. The nonpayment of rent and eviction resulted from plaintiff's use of funds to search for alternate housing.

(d) Plaintiff HORNECK is eight months pregnant and has a year old infant son. She is threatened with reduction of her basic needs grant by $33 per month, effective February 1, 1972 having only $88 to meet basic needs of $134. Living in substandard housing, plaintiff HORNECK fell behind in rent when searching for other housing.

(e) Plaintiff CARSON and her two infant children were reduced by $83.33 each month from January 1, 1972 and is left with only $76.65 or 40% of their basic needs to live on. A local agency error resulted in nonpayment of rent when the agency told plaintiff CARSON the rent would be paid directly to the landlord, but failed to do so.

3. Plaintiffs were coerced into accepting, or not notified or consulted in regard to, the recoupments. No income or resources were available to them to defray the impact of the lost basic needs grant. No determinations whatever were made as to the circumstances responsible for the nonpayment of rent.

VII

DEFENDANTS

1. The defendant, BARRY VAN LARE, as Acting Commissioner of the New York State Department of Social Services has primary responsibility for the administration of that Department in compliance with state and federal law. New York Social Services Law § 34.

2. The defendant, JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services is primarily responsible for the administration of that Department with state and federal law. New York Social Services Law § 62.

VIII

AS A FIRST CAUSE OF ACTION PLAINTIFFS ALLEGE

1) 18 NYCRR § 352.7(g)(6) violates the Social Security Act of 1935 and the regulations promulgated thereunder in that it mandates a reduction in assistance benefits where no additional income or resources are available to make up for the reduction.

2) 42 U.S.C. § 602(a)(10) provides that New York by accepting federal funds is under a duty, "that Aid to Dependent Children shall be furnished with reasonable promptness to all eligible individuals". 42 U.S.C. § 602(a)(7) provides that a "State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming and to families with dependent children".

3) 45 C.F.R. § 233.20(a) provides in pertinent part:

> "A State Plan for OOA, AFDC, AB, APTD, or AABD must, as specified below:
>
> * * * *
>
> (3)(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment:
>
> * * * *
>
> (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; (d) current payments of assistance will not be reduced because of prior overpayment unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment; . . ."
>
> * * * *
>
> (viii) Provide that payment will be based on the determination of the amount of assistance needed, . . ."

4) HEW, *Handbook of Public Assistance*, Part IV § 3131 provides that: "The State plan must provide that loans made under conditions that preclude their use for meeting current living costs and that are held and used in accordance with such conditions shall not be considered available for such needs and that the seems so held and used shall not be taken into account in determining the assistance payment.

5) The United States Department of Health Education and Welfare has not approved 18 NYCRR § 352.7 (g) (6).

6) Under 18 NYCRR § 352.7(g) (6) defendants violate the aforesaid provisions of law by reducing the monthly grants of recipients of public assistance who have received a grant to prevent eviction for nonpayment of rent for which a grant had been previously issued, when no income or resources are available to compensate for or to meet the residual need caused by, that reduction.

IX

AS AND FOR A SECOND CAUSE OF ACTION

1) 18 NYCRR § 352.7(g) (6) provides for the meeting of emergency housing needs caused by threat of eviction for nonpayment by merely spreading the "emergency" over a subsequent six month period through drastic deprivation of basic needs. Immediate eviction is avoided, but later deprivation is inflicted.

2) 42 U.S.C. § 606(e) provides for emergency assistance for families with dependent children, where a "child is without available resources . . . to provide living arrangements in a home for such child".

3) 45 C.F.R. § 233.120 provides that, apart from the regular need for public assistance, "emergency assistance will be given forthwith."

4) § 350-j of the Social Services Law provides that emergency assistance shall be provided "for children who are without available resources and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home . . ."

5) None of the aforesaid provisions for Emergency Assistance permits or requires any offset or recoupment of the assistance issued to meet the emergency.

6) 18 NYCRR § 352.7(g)(6) in effectively penalizing families with children who are in emergency circumstances because of threatened eviction for nonpayment, undercuts, circumvents and is entirely inconsistent with the Social Security Act's requirement to provide Emergency Assistance.

X

AS AND FOR A THIRD CAUSE OF ACTION

1) 18 NYCRR § 352.7(g)(6) in requiring the reduction of grants issued to children whose grants have been reduced because of prior payments to avoid eviction for nonpayment violates the fundamental mandate of the Social Security Act's Aid to Dependent Children Program, "to enable the child's unmet need to be supplied." HEW Handbook of Public Assistance, Part IV § 3401, and to refrain from penalizing children for the difficulties, faults or misfortunes of their parents.

XI

AS AND FOR A FOURTH CAUSE OF ACTION

1) All persons deemed needy in New York under § 131-a of the Social Services Law have their subsistence grants determined by the schedules provided in that statute without any deductions except for available income and resources.

2) § 137 of the Social Services Law exempts the grants of all recipients of public assistance from execution levy, assignment or transfer.

3) Plaintiffs as persons threatened with eviction for nonpayment, regardless of cause or circumstances, are singled out and forced by 18 NYCRR § 352.7(g)(6) to accept a drastic six month reduction in subsistence grants though no additional income or resources are available to compensate for said reduction.

4) Said regulation irrationally and invidiously discriminates against plaintiff victims of eviction. No basis exists in law or fact, consistent with the purposes of the Social Security Act, for reducing the level of payments to plaintiffs who are then forced to live far below the subsistence levels provided to all other persons. Said regulation applies a wholly different standard in determining the grant levels of plaintiffs than the income resource and exemptions from levy standard, applicable to all other persons in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

XII

AS AND FOR A FIFTH CAUSE OF ACTION

1) 18 NYCRR § 352.7(g)(6) provides for the automatic recoupment of rent "advances" made to prevent eviction for nonpayment of rent received previously in a grant, without any standards regarding or required determination as to the circumstances resulting in nonpayment.

2) There is no required relationship between the reduction or attribution of income imposed by said regulation and the acts, ommissions, fault, or needs of the respective families affected the innocent family whose nonpayment of rent resulted from circumstances entirely beyond its control, as with theft, is lumped together with all others. Regardless of circumstances which caused nonpayment eviction, all families so threatened are summarily reduced in the next six months.

3) The deprivation of statutory basic needs without any required standards relating that reduction to the particular facts in each instance violates the due process clause of the Fourteenth Amendment to the United States Constitution.

XIII

PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW

The implementation of 18 NYCRR § 352.7(g)(6) is causing and will continue to cause immense, irreparable and devastating harm to families with children whose basic needs of survival, food, clothing, and other essentials of life have been drastically curtailed, unless enjoined forthwith.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated that a three judge District Court be convened for the following purposes:

1) Enter preliminary and permanent injunctions enjoining the defendants, then successors in office, agents, employees and all other persons in active concert and participation with them from enforcing 18 NYCRR § 352.7(g)(6) on the grounds that said regulation violates the requirements of the federal Social Security Act and regulations promulgated thereunder and the Due Process and Equal Protection Clauses to the Fourteenth Amendment to the United States Constitution.

2) Enter in declaratory judgment holding that 18 NYCRR § 352.7(g)(6) is violative of the federal Social Security Act and regulations promulgated thereunder and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that said regulations reduces the level of payments of all persons issued made-up rent payments to forestall eviction without any additional income or resources being available to meet or make up for said reduction, while all other persons similarly without income or resources receive their full statutory entitlements.

3) Allow plaintiffs their costs herein and grant them and all other persons similarly situated such additional or alternative relief as the Court may deem to be just and proper.

Dated: February 10, 1972

LEONARD S. CLARK
By: BURR C. HOLLISTER,
Of counsel
Nassau County Law
Services Committee, Inc.
Attorney for Plaintiffs
1570 Old Country Road
Westbury, New York 11590
(516) 997-9680

IN UNITED STATES DISTRICT COURT

72 C 182

[Title Omitted]

ORDER TO SHOW CAUSE

Let defendants show cause in Courtroom No. 5 of the United States Courthouse, 225 Cadman Plaza, Brooklyn, New York, on the 18th day of February, 1972, at 10:00 A.M. or as soon thereafter as counsel may be heard why an order should not issue or the Court take such other action as shall grant the plaintiffs herein the following relief:

(1) A preliminary and permanent injunction restraining and enjoining defendants WYMAN and SHUART, their successors in office, agents and employees, and all persons in active concert and participation with them, from enforcing and implementing § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations;

(2) The convening of a three judge statutory court for the purpose of hearing and determining this application upon a preliminary and permanent injunction pursuant to the requirements of 28 U.S.C. § 2281 and § 2284.

(3) An order determining that this action may properly proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Let the defendants further show cause why a temporary restraining order pursuant to 28 U.S.C. § 2284 should not issue restraining the defendants, their successors in office, their agents and employees and all persons in active concert and participation with them, from taking any steps toward enforcing the mandatory six month reduction of basic needs allowances required by 18 N.Y.C.R.R. § 352.7(g)(6), pending the hearing and determination of plaintiffs' motion for a preliminary and permanent injunction by a three judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284.

Plaintiffs seek this temporary restraining order and preliminary and permanent injunction on the grounds that:

(1) 18 N.Y.C.R.R. § 352.7(g)(6) is violative of the Social Security Act, 42 U.S.C. § 601 *et seq.*, and the regulations promulgated thereunder. 45 CFR § 233.20(a), § 233.120, and is further invalid under the Due Process and Equal Protection Clauses to the Fourteenth Amendment to the United States Constitution;

(2) Plaintiffs and all others similarly situated are suffering immediate irreparable injury in that they are without the minimum means to provide themselves and their children with the basic necessities of food, clothing, household items, transportation and other essentials, as alleged in the complaint herein and the affidavits of CYNTHIA HAGANS, sworn to January 28, 1972, BERTHA GRISSETT, sworn to on February 3, 1972, KAREN HORNECK, sworn to on January 31, 1972, KATHRYN ZAVERZENCE, sworn to on January 31, 1972, and EURLEEN CARSON, sworn to on January 31, 1972. Immediate action to restrain 18 N.Y.C.R.R. § 352.7(g)(6) is required to prevent further injury to plaintiffs, as is alleged in the affidavit of BURR C. HOLLISTER, sworn to on February 8, 1972;

(3) The issuance of a temporary restraining order and preliminary injunction will in no way cause undue inconvenience or loss to defendants, but will prevent irreparable harm to plaintiffs;

(4) Plaintiffs have no adequate remedy at law as set forth in the complaint and affidavits submitted herewith.

IT IS ORDERED that service of this Order and the papers on which it is granted upon defendant WYMAN at his New York City office at 270 Broadway, New York, New York and upon defendant SHUART at County Seat Drive, Mineola, New York, on or before the 14th day of February, 1972, at 4:00 P.M. be deemed sufficient.

IT IS FURTHER ORDERED that service of the summons and complaint and this Order and the papers upon which it is granted may be made by the attorney for plaintiffs in this action.

SO ORDERED

/s/ Jacob Mishler
United States District Judge

At the United States Courthouse, 225 Cadman Plaza, Brooklyn, N.Y. this 10th day of February, 1972.

IN UNITED STATES DISTRICT COURT

[Title Omitted]

AFFIDAVIT AND MOTION

BURR C. HOLLISTER, being duly sworn, deposes and says that:

1. I am of counsel to Leonard S. Clark, attorney for the plaintiffs herein and make this affidavit in support of plaintiffs motion for the immediate convening of a three judge District Court pursuant to 28 USC § 2281 and 2284, a temporary restraining order and preliminary injunction restraining the enforcement of 18 NYCRR § 352.7 (g) (6).

2. Plaintiffs in this action seek a declaratory judgment that 18 NYCRR § 352.7(g) (6) violates the Federal Social Security Act of 1935, 42 USC § 602(a), the regulations promulgated thereunder, 45 USC § 233.120 (a), and HEW, Handbook of Public Assistance Administration, Part IV § 3131 and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that said regulation mandates the six-month lowering of plaintiffs' basic needs allowance where there is no additional income or resources available while all other needy families receive their full public assistance entitlements.

The named plaintiffs are five families residing in Nassau County. The five mothers and twelve infant children presently receive Aid to Dependent Children in monthly grants composed of a shelter grant to meet rent obligations, a basic needs grant to provide food, clothing, furniture, household supplies, bathroom accessories, transportation, utilities, and all other basic essentials of life, and a fuel for heating grant where heat is paid for by the recipient. Plaintiffs sue on behalf of all persons similarly affected or threatened by the application of challenged regulation. Defendants WYMAN and SHUART are the respective commissioners of the New York State Department of Social Services and Nassau County De-

partment of Social Services, both charged with the duty of enforcing said regulation.

3. Prior to August, 1971, needs of families in New York faced with imminent eviction were issued by Emergency Assistance pursuant to 45 CFR § 233.20 and § 350-j of the Social Services Law, to prevent displacement. No recoupment was sought for those funds expended to prevent eviction. On August 7, 1971, 18 NYCRR § 352.7(g)(6) was promulgated by the New York State Department of Social Services making recoupment mandatory, over a six month period from a family's basic needs budget, of all payments made to prevent eviction for nonpayment of rent for which a grant had been previously issued.

4. During the past several months, each of the plaintiffs faced imminent eviction for nonpayment in court proceedings brought by their respective landlords. Either one or two month's rent was owing in each instance and the reasons for nonpayment of such rent vary from undisputed theft of the entire month's grant, as for BERTHA GRISSETT, and prior inadequate rent allowances, as for CYNTHIA HAGANS, to use of the funds to locate new housing, as for KATHRYN ZAVERZENCE.

5. Regardless of the reason for nonpayment of the prior rent, and without the uncoerced consent of any of the plaintiffs, the Nassau County Department of Social Services issued rent grants to prevent eviction in each case, and then summarily and without proper notice has deducted the amount of that make up rent grant from the next six month's basic needs grants in six equal recoupments pursuant to the following statewide regulation made effective August 7, 1971:

> "For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent

grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

6. In none of the families was or is there any additional available income or resources to make up for these deductions during the coming months. Nor did the state or local agency even attempt to determine by notice and a hearing if such income or resources were to be available. The regulation totally ignores the only legitimate factors of eligibility permitted by the Social Security Act; the level of need, available income and resources and the maximum basic needs allowances by statute.

7. The results of this regulation are devastating and dramatic because the children in these families who have had eviction prevented are being deprived of vital necessities in their formative years. Th amounts that remain after recoupment range from 9% to 77% of the amount needed to sustain family subsistence needs. In the most stark sense, they will lack even the barest food and clothing during the recoupment period. The following plaintiffs' cases are representative of needy families throughout the state being severely injured by this regulation:

a) CYNTHIA HAGANS and her two infant children, who fell behind in rent in 1971 because she received a rent allowance of $165 and had to pay $200, have basic needs of $179 for February but will receive only $17 or 9% of their needs.

b) BERTHA GRISSETT and her five children suffered a robbery in August, 1971 which was fully corroborated and is undisputed. Her $250 August rent was issued in January to prevent eviction and her family's monthly basic needs allowance is being curtailed by $41.66 from $296 to $255 or to 77% of actual needs, during the six months after February 1, 1972.

c) KATHRYN ZAVERZENCE and her eight month old child are losing $45 per month from a basic needs grant of $121, leaving a remaining $76 or 56% for basic needs, each month for the next six months. This reduction represents a two month rental grant made to prevent eviction, from premises that Mrs. Zavesence wanted

desperately to move away from due to the slum conditions.

d) KAREN HORNECK pregnant and with a one year old son, likewise faced eviction from an apartment which she sought to escape because the gas heat inside was medically harmful to her son. The funds spent searching for shelter were not reimbursed and eviction was threatened. Summarily, a direct payment for two months arrears was made to the landlord, and $33.33 is to be deducted in six installments, leaving $108 or 70% of the funds needed to provide minimum essentials.

e) Beginning January 1972, EURLEEN CARSON and her two children are left with only $77 per month because $83.33 is being deducted each month to make up for a two month rent payment totaling $500. The rent arrears resulted from error by the agency which had failed to send the landlord rent directly.

f) Scores of other families with children likewise affected are to have their basic needs allowances summarily cut under said regulation, regardless of income and resources available. Most of the plaintiffs and others have future rents paid on a "restricted basis" directly to the landlord to prevent future nonpayment.

g) Since the remaining shelter allowance is either directly paid to the landlord, or like heat expense, is a fixed amount which must be paid each month, only the "basic needs" portion of the grant for food, clothing and other essentials—can "absorb" the loss and in actual fact, the deprivation suffered must come from these items of need.

8. These devastating recoupments violate the requirement of the federal Social Security Act that levels of allowances for public assistance, once set by statewide standards in each state, be reduced *only* if and to the extent that there are available income and resources to meet or make up the reduction. Absent such available funds, no month's grant can be reduced or suspended since, regardless of payments in prior months, a family's need is to be assessed from month to month, not over an entire six month period.

9. The Social Security Act, and regulations promulgated thereunder as more fully shown in plaintiffs' Memo-

randum of Law submitted herewith, provides that financial eligibility be determined based upon only such income as is actually available, and prohibits the reduction of federally funded public assistance grants below the grant levels established *unless* current income or resources are available in the amount of the reduction. 45 CFR § 233.20(a).

10. On information and belief, the United States Department of Health, Education, and Welfare has specifically found 18 NYCRR § 352.7(g)(6) to violate federal requirements:

> "Regulation 352(g)(6), cited as 352g(7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7 . . . Regulation 352g(7) . . . has the same deficiency relative to subsequent deductions of duplicate payments."

See copies of HEW—WYMAN 1971 correspondence attached hereto as Exhibit A.

11. No child should be penalized or deprived for the acts, omission, fault or misfortune of his parent. Yet, the twelve named AFDC children herein are being crushed by exactly this process, in violation of the Social Security Act's requirement that AFDC assistance shall be "to enable the child's unmet need to be supplied."

12. The Aid to Dependent Children assistance program is one half reimbursed by the federal government. Millions of federal dollars are received by New York each year in return for New York's being governed by the Social Security Act and the regulations promulgated thereunder by the U.S. Department of Health, Education and Welfare . . . On information and belief HEW has not approved New York's rent recoupment procedure. With each passing day, New York's regulation 18 NYCRR § 352.7(g)(6) blatantly violates these federal provisions.

13. Plaintiffs and their children have been threatened with eviction and are threatened now with crippling losses of their basic needs grants. Some needy families with income present will be denied eligibility through this recoupment device. Yet all others receive their full basic

needs allowances less available income and resources. There is no valid basis for reducing the grants of eviction victims who remain equally needy as are all other families receiving assistance, whose grants remain constant. All needy families except eviction victims have their grants determined by applying available income and resources against need. This discrimination is arbitrary, invidious and denies plaintiffs their right to Equal Protection of Law and Due Process of Law under the Fourteenth Amendment to the United States Constitution.

14. The plaintiff's claims herein are substantial. Defendants cannot in any way justify their departure from the federal requirement of deducting only available income for basic needs grants.

15. No prior application has been made for the relief requested herein. The plaintiffs and their children are suffering and will suffer irreparable and immediate harm because of the loss of basic needs allowances with no resources to meet those losses. The welfare allowance level is less than adequate for survival. Less food and clothing to these families is nothing short of absolute penury, destitution and want.

WHEREFORE, plaintiffs respectfully request that:

1. A three judge court be convened to hear and determine plaintiff's claims.

2. A temporary restraining order and preliminary injunction be issued restraining the defendants their agents and employees from enforcing 18 NYCRR § 352.7(g)(6) on the grounds that it probably violates the federal Social Security Act and regulations promulgated thereunder.

3. Such other and further relief as this Court may deem just and proper.

/s/ Burr C. Hollister
BURR C. HOLLISTER

EXHIBIT A

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

December 29, 1971

Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Western Avenue
Albany, N.Y. 12203

Re: Plan Submittal 71-68
(Standard of Assistance)

Dear Commissioner Wyman:

On November 15, 1971 we wrote you with reference to Submittal 71-61 advising that Regulation 352 g (6), cited as 352 g (7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7. We would like to bring to your attention that Submittal 71-68 continues the cited provision now in Regulation 352g(7) and adds a new subdivision (g) 5 of Regulation 352, which has the same deficiency relative to subsequent deductions of duplicated payments.

We have noted that in these two citations restrictive payments "may" be made of subsequent grants. Regulation 352.7(g)(1) jroviding for the handling of rent payments subsequent to fraudulent claims no non receipt of checks also indicates use of a restrictive payment. As you know, restrictive payments are not subject to Federal participation unless they fall within the Federal program guides in Regulations 20-4 and 20-5 (Protective Payments).

If it is felt that discussion of any of the foregoing is indicated; staff of the Regional Office is available.

Sincerely yours,

ELMER W. SMITH
Regional Commissioner

JDP:bf
cc: Mr. Smith
Mr. B. Luger
Audit Agency

EXHIBIT A

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

REGION II
26 Federal Plaza
New York, New York 10007

[SEAL]

Social and Rehabilitation Service

Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Albany Avenue
Albany, New York 12203
Re: Plan Submittal 71-61 (Standards of Assistance)

Dear Commissioner Wyman:

The captioned subject amends four of your States Regulations.

The Regulation 352.7 (g) provides for advance of rental payments by local agencies to recipients who are being evicted for non payment of rent, in instances in which such a grant has previously been made. It further provides that the duplicated payment will be "deducted from subsequent grants in equal amounts over not more than the next six months."

Regional staff has had several discussions with your staff on the matter of the subsequent deductions. In accordance with Federal Policy such subsequent deductions may be taken only if such funds are available. Our reference is Federal Program Regulation 20-7-item (3) (ii) (c) and (d). As presently written Regulation 352.7 (g) therefore does not meet Federal requirements.

We will be glad to further discuss this matter with your staff, if this is indicated.

Sincerely yours,

/s/ Elmer W. Smith
ELMER W. SMITH
Regional Commissioner

IN UNITED STATES DISTRICT COURT

[Title Omitted]

ANSWER

Defendant, George K. Wyman, Commissioner of the New York Department of Social Services, alleges as answer:

I. Defendant denies so much of paragraphs II that alleges that 18 NYCRR § 352.7(g)(6) violates the requirements of federal law or the Federal Constitution, and that alleges that the needs of the plaintiffs are not met.

II. Defendant denies paragraph IV(2).

III. Defendant denies so much of paragraphs V(3), (5), (6), (7), 8 and VI(3) that alleges that defendants have a duty to meet current needs, that the amount of assistance cannot legally be reduced for any given month unless there is available income to make up the reduction, and that needs of the plaintiffs are unmet.

IV. Defendant denies so much of paragraph V(5) and VI(3) that alleges that any element of choice is illusory and coerced, and denies so much of paragraph V(8) that alleges a denial of Welfare eligibility to plaintiffs.

V. Defendant denies so much of paragraph VI as alleges that this complaint presents a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

VI. Defendant denies knowledge and information sufficient to form a belief as to each and every allegation set forth in paragraphs VI(2)(a),(b),(c),(d), and (e).

VII. Defendant denies each and every allegation set forth in paragraphs VIII(1) and (6), IX, X(1),(2), (3), and XI.

VIII. Defendant alleges that the complaint *in toto* does not state a claim upon which relief could be granted.

WHEREFORE, defendant requests that the order temporarily restraining defendants from implementing 18

NYCRR § 352.7(g)(6) be rescinded and the complaint be dismissed.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
George K. Wyman
80 Centre Street
New York, New York 10013

IN UNITED STATES DISTRICT COURT

[Title Omitted]

72 C 182

TEMPORARY RESTRAINING ORDER

Plaintiffs having moved this Court pursuant to Title 28 United States Code Section 2284(3) for a temporary restraining order restraining the defendants from enforcing the provision of 18 NYCRR § 352.7(g)(6) which requires that any "advance" payments made to prevent eviction of, or to rehouse a family threatened with eviction for nonpayment of rent for which a grant has been previously issued, be deducted from subsequent grants in equal amounts over not more than the next six months, and this motion having been considered by this Court.

Upon the pleadings, affidavits, exhibits and briefs submitted on behalf of the parties, and upon the finding by this Court that (1) substantial questions have been raised by plaintiffs about the validity of said deduction requirement of 18 NYCRR § 352.7(g)(6) insofar as it effectuates a reduction in the grant levels of public assistance for families if threatened with eviction without any available income or resources being present, which require further consideration by a statutory three judge court, and (2) recipients of public assistance throughout the State of New York are now suffering, and will continue to suffer, irreparable injury as a result of the said deductions from basic needs allowances mandated by said regulation, it is,

ORDERED, ADJUDGED and DECREED that, pending hearing and determination by a single judge court of the statutory claim determining the validity of the mandatory deductions effectuated by said 18 NYCRR § 352.7(g)(6) [now 352.7(g)(7) as promulgated December 6, 1971]:

Defendant WYMAN, his successors in office, agents and employees, and all persons in active concert and participation with them, including local social services officials

administering the Aid to Families with Dependent Children and Aid to the Aged, Blind and Disabled programs under State supervision, insofar as said officials have actual notice of this temporary restraining order, are hereby restrained from denying, reducing or discontinuing public assistance benefits on the basis of deductions mandated by 18 NYCRR § 352.7(g)(6) for payments made to prevent eviction or to secure rehousing of families threatened by eviction for nonpayment of rent for which a grant has previously been issued, provided the time limitation of 6 months is extended for the period of the stay.

DATED: Brooklyn, New York
February 18, 1972

/s/ Jacob Mishler
U.S.D.J.

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

72 Civ. 182

[Title Omitted]

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the respective attorneys for the parties herein, that the following facts are admitted and agreed upon and require no proof.

1. The plaintiffs in this action are CYNTHIA HAGANS, individually and on behalf of her minor children, Kimberly age 5 years, and Korey age 14 months, BERTHA GRISSETT, individually and on behalf of her minor children, Deborah age 12, Angelo age 10, William age 9, Linda age 8 and Cynthia age 6, KATHRYN ZAVERZENCE, individually and on behalf of her minor child, Dana Lynn age nine months, KAREN HORNECK, individually and on behalf of her minor children, Todd age one year and an expected baby, EURLEEN CARSON, individually and on behalf of her minor children, Timothy age 11 and Calvin age 13, as well as all recipients of public assistance in the Aid to Dependent Children category residing in New York State whose monthly grants have been reduced to prevent eviction by virtue of the implementation and application of 18 N.Y.C.R.R. § 352.7 (g) (6).

2. Defendants are GEORGE K. WYMAN, the Commissioner of the New York State Department of Social Services and JAMES M. SHUART, Commissioner of the Nassau County Department of Social Services, both of whom are public officials charged with administering the public assistance in compliance with state and federal law.

3. New York State's program for Aid to Families with Dependent Children (AFDC) is operated with 50% federal financial reimbursement, pursuant to the requirements of the Social Security Act, 42 U.S.C. § 601 et seq.,

New York receives millions of dollars annually in federal monies to help operate and fund its AFDC program. Pursuant to required state plan, 42 U.S.C. § 602(a)(23), New York State has enacted Social Services Law § 131-a, which provides for a schedule of basic needs per family based on the number of individuals per household and a concomitant schedule of grants and allowances. The standard of need represents items of basic maintenance such as food, clothing, utilities, furniture, household supplies, laundry, personal expenses, transportation, etc., as set forth in Rosado v. Wyman, 322 F. Supp. 1173 (E.D. N.Y. 1970) but exclusive of shelter and fuel. The schedule of grants as set by § 131-a, Laws 1971 Ch. 133, establish that for AFDC families, New York pays ninety percent of the statewide standard of need.

4. By regulation, 18 N.Y.C.R.R. § 352.3, each social services district in New York has established a maximum monthly allowance schedule for rent. The rent allowance in each case is in the amount actually paid by the recipient family but not in excess of the respective appropriate maximum of the schedule. Where fuel is paid separately, a monthly grant therefor is also issued as per 18 N.Y.C.R.R. § 352.5.

5. On August 6, 1971, the New York State Department of Social Services promulgated a new statewide regulation 18 N.Y.C.R.R. § 352.7(g)(6), which provides that for a recipient who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent eviction or rehouse the family and that such advances shall be deducted from subsequent grants in equal amounts over not more than six months.

* * * *

7. The plaintiff, CYNTHIA HAGANS, and her two minor children are eligible for and receive Aid to Families with Dependent Children and their monthly basic needs in accordance with Social Services Law § 131-a have been determined to be $179, their monthly grant being $161. In 1971 she lived in an apartment in Massapequa, New York, with a monthly rental of $200; she then received a shelter allowance from the Nassau County

Department of Social Services in the amount of $165, the maximum allowed under the Nassau County Department of Social Services rent schedule, and was unable to locate alternate housing at that rental. Plaintiff HAGANS accumulated arrears on her rent payments because of the $35 deficiency for which no allowance was made in the basic needs grant. In December 1971, plaintiff was one month in arrears. In January 1972, plaintiff HAGANS was evicted from her apartment for non-payment and was served with a warrant. Plaintiff HAGANS used her January shelter allowance for expenses related to securing new housing. In January 1972, the defendant SHUART, because of the emergency presented, approved the new housing which Mrs. Hagans had located in Amityville, a one family home at a monthly rental of $175 per month with fuel extra, but informed plaintiff that pursuant to 18 N.Y.C.R.R. § 352.7(g)(6) her February grant would be reduced from $357, comprised of $175 rent, $161 basic neds plus $21 for fuel, to $192 because of a recoupment of the $165 duplicate rent payment made in January. The deduction of the month's rent was made in a single month because plaintiff's new housing is in Suffolk County and Nassau County is responsible for issuing grants for the family's assistance only through February 1972, pursuant to State Regulations mandatin ga two-month carryover period when a family moves from one district to another within New York State. Only one month, February, was available to Nassau County for recoupment. Out of the $192 grant in February, $175 must be paid for rent, leaving $17 for basic needs for the family of three. Plaintiff HAGANS has no additional income or resources to meet basic needs in February, 1972.

8. Plaintiff BERTHA GRISSETT and her five infant children receive Aid to Families with Dependent Children and receive a monthly grant of $296, exclusive of shelter and fuel, to cover all the family's basic needs. In August, 1971, plaintiff GRISSETT suffered a robbery of the proceeds of her full grant, $593.75, which amount included her shelter allowance of $250. The fact of the robbery and resulting loss was established in New York

State Supreme Court, Nassau County (New York Law Journal, October 22, 1971, p. 20, col. 3). The defendant SHUART issued a duplicate rent allowance in January 1972 when eviction was threatened and made payment of the August 1971 rent. The defendant SHUART notified plaintiff GRISSETT that effective February 1, 1972, her grant of assistance would be reduced by the sum of $41.66 for a period of six months to recoup the duplicate August payment. That in February 1972, plaintiff GRISSETT's grant to cover the basic needs for the family of six were reduced from $296 to $254.34. Plaintiff GRISSETT has no additional income available to meet the family's basic needs.

9. Plaintiff KATHRYN ZAVERZENCE and her infant child receive Aid to Families with Dependent Children from the defendant SHUART. The family of two receive a total monthly grant of $121 to cover the family's basic monthly needs, exclusive of a $135 shelter allowance. Plaintiff did not pay the rent for December 1971 and January 1972, complaining of the condition of the apartment and its state of disrepair. A non-payment proceeding was commenced against plaintiff, and the defendant SHUART, without plaintiff's knowledge or consent, paid the sum of $270 representing the rent sued for, directly to the landlord, thereby causing the non-payment proceeding to be terminated. In January 1972 plaintiff ZAVERZENCE was informed that pursuant to 18 N.Y.C.R.R. §352.7(g)(6) the family's basic needs grant would be reduced from $121 to $76 for a six month period to recoup the rent paid by defendant SHUART. The fixed shelter cost of $135 is being sent directly to the landlord on a restricted payment basis pursuant to 18 N.Y.C.R.R. § 352.7(g)(6). Plaintiff ZAVERZENCE has no additional income or resources to meet the family's full basic needs during the period of the recoupment.

10. Plaintiff KAREN HORNECK, who is pregnant, and her child are receiving Aid to Families with Dependent Children from defendant SHUART. Plaintiff HORNECK receives a monthly grant of $154 to cover the family's basic needs. Plaintiff HORNECK and her

family occupy an apartment for which the monthly rent is $100 and which requires payment for fuel separately. Plaintiff's child was found by his physician to be allergic to the gas heating system in his room and experiences bronchitus attacks. Plaintiff did not pay the January 1972 rent, contending that the money was used for expenses related to obtaining alternative housing. The defendant SHUART in January 1972 paid the rent without plaintiff HORNECK's knowledge or consent directly to the landlord. Plaintiff HORNECK was notified that the defendant SHUART, pursuant to 18 N.Y.C.R.R. §352.7(g)(6) would recoup the $200 over a period of six months effective February 1, 1972. In February 1972 plaintiff HORNECK received a grant of $108 instead of the state determined level of assistance for a family of two $142. ($127 basic needs plus $21 for fuel). The landlord received rent directly on a restricted payment basis pursuant to 18 N.Y.C.R.R. § 352.7(g)(6). Plaintiff has no additional income to meet the family's needs.

11. Plaintiff EURLEEN CARSON and her two infant children receive Aid to Families with Dependent Children from JAMES M. SHUART. Prior to August 15, 1971, the family resided in the Jericho Motel in Jericho, New York, and received a monthly grant of $353 including restaurant allowance to meet their basic needs, exclusive of shelter which was paid directly to the motel. That in August defendant SHUART secured an apartment for the family in Freeport at a monthly rent of $250 Plaintiff's first month's rent was paid directly to the landlord by defendant SHUART. Plaintiff made no payments of rent in October and November, 1971, by reason of her misapprehension that defendant SHUART would continue making direct payments of rent to the landlord by voucher. In December 1971, plaintiff CARSON was informed by the Department of Social Services that they had not paid the landlord directly but had included a shelter allowance of $250 in each monthly grant since September 1971. The defendant SHUART paid the sum of $500 to the landlord when eviction was threatened and informed plaintiff CARSON in January 1972 that pursuant to 18 N.Y.C.R.R. § 352.7(g)(6) said sum would

be recouped from the family's monthly basic needs grant of $161 over a period of six months. Effective February 1, 1972, the family's grant for basic needs was reduced from $161 to $77.65, the landlord now receiving rent on a restricted payment basis as per 18 N.Y.C.R.R. § 352.7 (g) (6). Plaintiff has no other income to meet the family's basic needs during the period of the recoupment.

• • • •

13. That the United States Department of Health, Education and Welfare (HEW) is the federal agency charged with the primary responsibility for interpreting the AFDC requirements of the Social Security Act and of reviewing state plans that are federally funded as they relate to the requirements of the Social Security Act and the regulations promulgated thereunder.

14. To determine whether state plans continue to meet the federal requirements, New York and each state is required by regulation to submit to HEW for review all relevant changes such as new state statutes, regulations and court decisions.

15. In 1971, defendant WYMAN submitted 18 N.Y. C.R.R. § 352.7(g) (6) to the Regional Commissioner of HEW. Consultations were held subsequent thereto regarding the validity of the regulation and federal reimbursement being available thereunder. By letter dated November 15, 1971, HEW's Regional Commisioner informed defendant WYMAN that 18 N.Y.C.R.R. § 352.7 (g) (6) did not meet the federal requirements embodied in 45 CFR § 233.20(a). By letter dated December 29, 1971, HEW again informed defendant WYMAN of HEW's objections to the recoupment provision. Copies of said correspondence between HEW and defendant WYMAN are hereby acknowledged and introduced into evidence.

16. The affidavits submitted herein by plaintiff and defendant are accepted into evidence as part of the record herein.

Dated: Brooklyn, New York
February 28, 1972

/s/ _____
CARL JAY NATHANSON
Attorney for Plaintiffs

/s/ _____
MICHAEL COWONER
Attorney for Defendant
Wyman

/s/ _____
JAMES N. GALLAGHER,
Attorney for Defendant
Shuart

IN UNITED STATES DISTRICT COURT

72 C 182

[Title Omitted]

TESTIMONY OF ARTHUR J. DORING

United States Courthouse
Brooklyn, New York

February 28, 1972
10:00 o'clock A.M.

Before:

HON. JACOB MISHLER,
Chief U.S.D.J.

ILENE GINSBERG
Acting Official Reporter

Appearances:

Leonard C. Clark, Esq.,
Attorney for Plaintiff

By: CARL JAY NATHANSON, ESQ., of counsel.

Louis J. Lefkowitz
Attorney General, State of New York
Atorney for Defendant

By: MICHAEL COLODNER, ESQ., of Counsel.

Joseph Jaspan, Esq.
Nassau County Attorney

By: JAMES GALLAGHER, ESQ., of Counsel.

[18]*

* * * *

THE COURT: All right. Call your first witness.

MR. COLODNER: The defendant calls Arthur J. Doring.

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* Numbers in parenthesis refer to pagination of trial transcript.

THE CLERK. State your name and address for the Court.

THE WITNESS: Arthur J. Doring, D-o-r-i-n-g, 40 Kinlich Avenue, Troy, New York.

ARTHUR J. DORING, being called as a witness, first being duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLODNER:

Q What is your present position, sir?

A Consultant with the State Department of Social Services.

Q What position did you hold prior to this?

A Special Consultant, Bureau of Program Standards, State Department of Social Services, Division of Family Services.

THE COURT: Your expertise is in family what?

THE WITNESS: Family services.

[19] THE COURT: Division of Family Services—all right.

Q Are you familiar with the regulation 18 NYCRR 352.7(g)6?

A I am.

Q On what do you base your knowledge of this regulation?

A On the policy and the format of the regulations.

Q Could you describe the activity that you participated in with regard to developing this regulation?

A One of the problems that we had encountered, particularly last year, or last year it came to light that there was a very high cost problem of hotel, motel residency. The high number of recipients being housed in hotels and motels was due to a lack of private dwellings. We had at the time completed the study in Nassau County because of the very high cost that was involved in that particular county, and then they had requested that we review our reimbursement policy on the hotels, motels.

On the basis of this we did a thorough review of each case that had been housed in May and June.

Q What year?
A 1971, in Nassau County.
Q What were the results of this study?
[20] MR. NATHANSON: I object. I ask the study be offered and that is the best evidence.
THE COURT: Is there an official report of the study?
THE WITNESS: Yes, sir.
MR. COLODNER: I will offer it into evidence.
THE COURT: You may point out the pertinent parts of the report, but if that is the official document I think that is what should be offered.
Q Is this the report you refer to?
A Yes; it is.
MR. COLODNER: I would like to offer this.
THE COURT: Any objection?
MR. NATHANSON: I have not seen it yet.
No objection.
THE CLERK: Report—
THE COURT: Do you have an extra copy of the report?
MR. COLODNER: No.
[21] THE COURT: Is it available?
MR. COLODNER: We had a very difficult time in locating that one. If I could Xerox it—
THE CLERK: Eleven page report marked Defendant's Exhibit A in evidence.

(So marked.)

THE COURT: Do you require this, counsel?
MR. COLODNER: No.
Q As a result of this report what changes in policy were recommended?
A The major change in policy was the development of regulations. We felt it would be an administrative tool which we thought would help people in managing their money in terms of duplicate rent payment. Our figures in that report show a significant number, approximately 62 percent—
THE COURT: Just a moment, please. Would you read that back.

(Read by reporter.)

THE WITNESS: That is correct. 62 percent were in hotels or motels because of eviction for non-payment of rent.

[22] Q Why was the provision for duplicate payment instituted?

A I believe that—

MR. NATHANSON: Objection.

THE COURT: Read that back, please.

(The reporter read the preceding question.)

THE COURT: I will allow the question.

Q Why were duplicate payments then instituted?

A There had been duplicate payments. Previously agencies had made duplicate payments to prevent eviction. What was added to this report was the provision that there be recoupment from a duplicate payment.

Q Why was this?

A Primarily because of management problems. There was a consensus of the people that worked on the regulation policy that we wanted to avoid wide spread abuse. We were limited by law in paying basic grants plus shelter items. It was the consensus of the policy making group that with the duplicate payment system it would prevent wide spread use of letting the rent go—having it duplicated—and essentially, this would correct the problem, if we could recoup.

Q Would there be any problems involved if the [23] persons—

MR. COLODNER: I withdraw that.

THE COURT: There are two theories upon which I can accept testimony at this time. One, if it explains the language or the unclear thoughts of the report, and two, where Mr. Doring is testifying as an expert in a particular field, as a consultant.

So when you say "Why?", I suppose it is one of those two theories. When he says there is a consensus of opinion he is not giving his opinion he is really telling what is in the report.

THE WITNESS: May I specify, Your Honor that I wrote that report? This is my language.

THE COURT: I see.

How many were in this project?

THE WITNESS: I think I had six. I received cases from caseworkers who did the actual case reviews who are employees of our department, the State Department of Social Services.

[24] THE COURT: Were these from outside the county?

THE WITNESS: Yes. We have a division where we operate the state hospitals, and we have social service workers on that staff. I made use of these people.

THE COURT: So it is really your report, and the statistical information was gathered by you, by your people?

THE WITNESS: Yes. I summarized it and wrote the narrative.

Q The recommendation of the report, I take it, is that recoupment be instituted as one means of solving the problem?

A That is correct.

Q If the State is not able to use recoupment as a means of providing duplicate payment, what alternatives would it have?

A We placed people on indirect payment. You see, the rent item which is a restricted grant, we have limits in terms of Federal financial participation on restrictive payments in family cases, in that we can receive 10 percent of the family restricted payment in one month without [25] losing Federal aid.

Q So then who would bear the cost?

A The State and County.

Q To your knowledge, has the State issued any written interpretation of this regulation, 352.7(g)6 other than the language of the regulation itself?

A The only thing we have is the regulation as it is contained in the bulletin material on standards, and that is the language of the regulation.

Q No other language?

A No.

THE COURT: If you made the check payable to the person and the landlord—

THE WITNESS: That is restricted, Your Honor.

THE COURT: If you made two separate payments

to the recipient and you suggested very strongly to the recipient that it should be used as payment for rent—well, I don't know if it would work.

THE WITNESS: When we compute a grant of assistance we compute it on basic needs. Then we add a shelter allowance and a heating, which is a fuel allowance and when this is [26] completed a copy of that budgetory computation is given to the recipient so he or she is aware of the major breakdown of the computation of the check. We cannot tell the recipient this is for rent. He has free and unrestricted use of the money. But we have to give him a breakdown of how the grant was computed.

THE COURT: Are you talking about basic needs in terms of minimum subsistence levels?

THE WITNESS: Well, according to the standards that are set. Food, clothing personal items. The normal factors.

THE COURT: You are familiar with the term "standard of need"?

THE WITNESS: Yes.

THE COURT: What is that?

THE WITNESS: That consists of all the items such as what I have just mentioned; food, clothing, incidentals, household supplies, plus shelter, plus rent. That is the standard of need, plus fuel for heating translated into monthly amounts.

[27] THE COURT: Those monthly amounts represent the minimum amount needed for—

THE WITNESS: Subsistence.

THE COURT: Which translated in the common vernacular really means to support life.

THE WITNESS: That is correct.

THE COURT: And the benefit in New York State is 100 percent on the standard of need. Not the other states because, of course, it varies.

THE WITNESS: Yes.

THE COURT: Sometimes they tell you how much is required to live on and the state says we will give you half.

THE WITNESS: We have a ratable reduction. It is 10 percent and it applies to the basic standard of need, exclusive of the standard of rent and heat. It is 10 percent as based upon the schedule.

THE COURT: Translated once again into terms of recoupment it someone's check is within half of what the state determines the standard to be, then, in effect, what you are saying is [28] here is half of what you need to live on that month. Is that right?

THE WITNESS: I believe you could say that correctly.

THE COURT: You understand that that is what bothers me.

All right. Continue.

Q Prior to the formation and the implementation of this regulation what was the prior policy in this State with regard to duplicate payments and recoupment?

A In circumstances where it turned out that checks are not stolen, but were duplicated, we have provision for recoupment. That would apply to circumstances where the checks were used fraudulently.

THE COURT: So where the money the recipient receives, and the recipient is distinguished from the children, where the recipient used that money fraudulently then recoupment was the policy?

THE WITNESS: Yes.

THE COURT: Over what period did you recoup?

THE WITNESS: I don't believe we had a set policy as to the period of time, Your Honor.

[29] THE COURT: All right.

THE WITNESS: I believe the regulation simply indicates it can be recouped. I would have to refer to the regulation.

Q Was there any other statement in the regulations with regard to the recoupment?

A I don't believe so.

Q Do you have any knowledge of a locality having a recoup provision?

A I believe the State of New York.

Q In what circumstance?

A Duplication of rent payments.

THE COURT: I would like you to go to the policy prior to the promulgation of the regulation regarding all other types of loss. I now know that in fraud the county would have recouped, but how about all other types of loss that have no wrong doing? How about pure negligence where the parties just lost the money?

MR. NATHANSON: You are asking about prior policy?

THE COURT: Yes. I am interested in what the change is because apparently the [30] County seeks to limit the effect of this regulation to just certain situations and not to all situations, which include fraud, mismanagement, no fault, and so forth. I want to know what the difference is and why the need for the regulation. I think this would point it up if I knew what the policy was before the regulation.

Q With regard to the policy before the regulation in what specific circumstance was recoupment permitted either by the State or localities?

A You are asking for recoupment or duplication?

Q Duplication with recoupment.

A We have, under—

THE COURT: Excuse me. Maybe I don't understand the significance of the question. You will have recoupment only where there is duplication. If there is no double payment?

THE WITNESS: I am trying to understand the question. I believe you mean policy with regard other than the duplication of payment of rent, and we have one where cash is lost or stolen. The agency may duplicate and there is no recoupment requirement.

[31] THE COURT: I see.

Suppose Mrs. Hagans saw a big sale on steaks one day and spent $175 for steak. She has got them in the freezer and then it turns bad because she cannot use them. That is pure mismanagement. There would be no duplication?

THE WITNESS: That is correct. We have provisions in mismanagement for processing payment, but not for a particular item. These would be considered restrictive payments. If one required restrictive payments

what we would do would be to have a payee designated.

THE COURT: No, no. She spent her money foolishly and had no money for essentials. Suppose you duplicated that payment. Would you duplicate it prior to the regulation? This isn't fraud or loss.

THE WITNESS: Rent payment or any payment?

THE COURT: Duplicating a payment for basic needs.

THE WITNESS: We have no provisions [32] for basic needs.

THE COURT: Usually the failure to pay rent is due to mismanagement, so say she used the rent money to buy food. Pure mismanagement.

THE WITNESS: Under the present regulations the agency could duplicate and recoup where there is an eviction.

THE COURT: Before?

THE WITNESS: We had no policy before.

THE COURT: So you wouldn't recoup it?

THE WITNESS: Nor would we reimburse.

THE COURT: But when you duplicate the payment, doesn't that mean you reimburse? I am talking about the relationship between the County and the individual. You are saying that if the County's policy was to reimburse you would not reimburse the County.

THE WITNESS: Correct.

THE COURT: So we really don't know what the policy of the County was prior to the regulation. Would you know?

[33] THE WITNESS: You would have to ask the representative of the County. I could state that counties, statewide, do or have duplicated rent at their own expense.

Q If the agency makes a determination to reduce a monthly check because of recoupment of an advance allowance for rent under this regulation does the recipient have any remedy to contest this regulation?

A Yes. There is a fair hearing procedure.

THE COURT: The statute requires that, doesn't it?

THE WITNESS: Any reduction would raise the question of adequacy of assistance.

THE COURT: I am talking about the Federal statute. Isn't that one of the provisions?

THE WITNESS: For a fair hearing?

THE COURT: Yes.

THE WITNESS: Yes, sir.

Q If a fair hearing was applied for, and let us assume this hypothetical situation, that the recipient, that the reason she required an advance loan for rent was because she claimed the welfare money was stolen—the cash itself—would there be any circumstances under [34] which the State would oppose the claim of the recipient that the money should not be recouped?

MR. NATHANSON: I object. If he wants to ask about the facts in the case, fine. But a hypothetical question—

THE COURT: Would you read that back, please?

(The last question read by the reporter.)

THE COURT: I will allow it.

A If I understand correctly, if the claimant maintained the money was stolen, would that be a possibility that the agency would not be upheld on the recoupment issue?

Q Yes.

A That is a possibility.

Q In other words, is the regulation mandatory that in every case that a rent payment is duplicated that there has to be recoupment?

MR. NATHANSON: Objection. The regulation speaks for itself.

THE COURT: Overruled.

I will allow it.

A That is not our interpretation of the regulation. It is not that cut and dry that there has to be recoupment. [35] It is geared towards mismanagement.

Q If at a fair hearing a recipient—

THE COURT: First let me understand this. Did you help draw this regulation?

THE WITNESS: Yes.

THE COURT: It was your language?

THE WITNESS: Yes, sir.

THE COURT: It says "For a recipient of public assistance who is being evicted"— you say being evicted— "for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family"—where he has a family.

THE WITNESS: That is correct.

THE COURT: Shouldn't that read "must" instead of "may be"?

THE WITNESS: Must?

THE COURT: If the grant is not approved I assume there is an eviction.

THE WITNESS: Yes, sir.

THE COURT: Isn't it mandatory that you rehouse the family?

THE WITNESS: This is one of the [36] problems.

THE COURT: So I say, shouldn't that read "must"?

THE WITNESS: If we state "must" instead of "may be," we are in conflict with the Social Services Law that states the amount we can make provision for.

THE COURT: But you recognize this as an obligation to give shelter to a dependent family?

THE WITNESS: Yes.

THE COURT: So it is pretty strong that you have to do something—either prevent eviction or have the people housed.

The next is "Such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months". Do you say that is optional, once you made the advance?

THE WITNESS: No. Once you make the advance on a duplication of rent on a mismanagement basis, it shall be recouped according to the regulations. If that advance is made, for example, on the basis that the funds [37] were stolen, it doesn't apply. We have no stipulation under 352.2 where we make a duplication of a grant for stolen funds regarding recoupment.

THE COURT: In other words, this subsection doesn't limit recoupment to mismanagement.

THE WITNESS: I concur with that.

THE COURT: Is there another section that does?

THE WITNESS: No.

THE COURT: So this is the only section that applies to duplication and the right to recoupment?

THE WITNESS: Other than fraudulence.

THE COURT: You say that the State provided a procedure for determining whether it is mismanagement or a wrong committed by the recipient, and if committed by the recipient then a recoupment is allowed, but if it is just pure mismanagement or rather if it is outside of the control of the recipient, then recoupment is not allowed?

THE WITNESS: I did say that was [38] generally done with full knowledge and consent.

THE COURT: Under this regulation, is the policy of this regulation that the recipient who is to be evicted consents to the agent paying the duplicate payment of rent before such payment is made?

THE WITNESS: I can only answer that by saying that it is good practice to discuss all practices with the recipient. The recipient has basic rights to know what is going on and what action the agency is taking or has taken. I would assume that the agency would discuss it with the recipient.

THE COURT: Could the recipient ask for a fair hearing on the grounds that she did not consent?

THE WITNESS: I think it would have to be on the grounds of inadequacy of assistance whether she consented or not, that if subsequent checks are in fact reduced as part of the recoupment her basis for a hearing would be on the fact that her checks did not meet the standard of need. In other words, inadequacy.

[39] THE COURT: I see.

One more question.

Could, at this first hearing, a recipient claim that the recoupment made was too harsh. Taking the situation of plaintiff Hagans that the recoupment should not have been made all in one month but should have been spread out over six months.

THE WITNESS: Certainly.

THE COURT: Does this regulation permit partial recoupment? For example, I think she says a certain

need was reduced to $17 for that month. Could she say, recoup only a partial amount instead of recouping $250, I think it was over a period of six months?

In other words, recoupment of the total amount, is that a mandate?

THE WITNESS: On the basis of the regulations I would say the total amount.

THE COURT: Even though it might result in the deprivation of the basic needs?

THE WITNESS: I believe that is correct.

THE COURT: I have no further questions.

You may cross-examine, Mr. Nathanson.

[40] CROSS-EXAMINATION

BY MR. NATHANSON:

Q Can you tell the Court how many cases of mismanagement there were in New York State last month?

A No.

THE COURT: Can you approximate it? Does it run into the hundreds of thousands or tens of thousands?

THE WITNESS: I don't have that data, Your Honor.

Q For the local county system to be reimbursed for payment that they made, do they have to fill out reports?

A What kind of reports?

Q Restricted payment. Is that information asked for?

A The restricted payments are because of the claims.

Q Duplicate payments?

A I don't know.

Q You wouldn't know how many number of restricted payments there were last year?

A No.

Q With respect to this regulation 352.7(g)6, is the local district required to hold any hearing before [41] they reduce this monthly grant?

A Any change in grant, I believe, the client is entitled to a review.

Q Before or after the reduction?

A Before.

Q Do you say the regulations require a hearing before reduction?

A Fair hearing?

Q What hearing are you talking about?

A Supervisory review in the local agency.

Q Do you say your regulation provided that type of hearing?

A I would have to research the regulation.

Q Would you let me show you a copy of the regulation?

A Surely.

MR. NATHANSON: May I, Your Honor?

THE COURT: Yes.

A I believe the regulations—perhaps Mr. Barry would be more familiar with it on the question of the hearings.

Q Now, to your knowledge, is a hearing required prior to the recoupment according to that regulation?

[42] A No. I didn't understand your question.

Q Is the consent of the recipient necessary before the local district recoups that money? In other words, before the local district can recoup the money does the recipient have to consent or is it done as soon as a duplicate grant for rent is made?

A It is an automatic procedure set up to initiate recoupment.

Q You are familiar with housing conditions in Nassau County?

A I believe so.

Q Would it be correct to state that there is an acute housing shortage in Nassau County?

A That is an under estimate.

Q Are there many families in Nassau County who receive aid for shelter from the Social Service Department whose aid constitutes less than the actual rent they pay?

A You would have to speak with the local agencies. Each county is required to submit a schedule.

Q The Department doesn't—I am talking about the State—that neither approves nor rejects schedules that the County promulgates.

A Yes, they do. They are required to file them with us for approval.

[43] Q Do you know of any case where the State has rejected a rent schedule?

A Myself, no.

Q You did a study of Nassau County regarding the housing conditions?

A That is correct.

Q I ask you again, are you aware of any instance where the shelter allowance that the clients received is less than the actual rent paid?

A In that study no, and those are the only cases I had seen.

Q If a client were paying more rent than the allowance they received, and they built up arrears on their monthly rent payments to the point where they required duplicate payments, is that client considered guilty of mismanagement?

A Are you asking for a subjective opinion?

THE COURT: As an expert. Your opinion as an expert. I think you are an expert in the field.

THE WITNESS: No.

Q They would not be entitled to a duplicate payment?

THE COURT: No. They would not be [44] charged with mismanagement.

A I wouldn't consider it mismanagement. I would consider that the person is living on a higher price schedule than the allowance provided.

Q But the regulation says where the Department has given a grant for rent and duplicated that grant there has to be a recoupment. Wouldn't that fall within your regulation—those facts?

A The facts you mentioned?

Q Yes, sir.

A It would be apt to, yes.

Q With respect to the State level of assistance, New York has determined a standard of need that families need to survive on. A minimum standard to survive on.

A That is correct.

Q And New York State does not pay the full amount of the assistance—90 percent of the family's need?

A Exclusive of their shelter.

Q Prior to August 6, 1971?

THE COURT: Referring to the *Rosado* case it is my recollection that New York State did pay 100 percent.

THE WITNESS: Correct.

[44A] THE COURT: The problem in *Rosado* was that Congress mandated a cost of living increase. Are you saying now that the level of benefit in dollar amounts is less than it was in—I think *Rosado* was 1969—what about it?

MR. NATHANSON: Yes, Your Honor.

THE WITNESS: I believe it was 1969.

THE COURT: And you say it is less now in dollar amounts than 1969?

THE WITNESS: Yes, I do. This was enacted by the State Legislature.

THE COURT: So the same family, a mother and three children, got $X in 1969. Now, they get $X minus certain factors.

THE WITNESS: Correct. Although I believe in the *Rosado* case, and I am strictly going by recollection, the standard was brought up to one level, statewide.

THE COURT: That is right. So that there were increases in some situations?

THE WITNESS: That is correct. They were brought up to the New York level.

THE COURT: That was the point in Nassau County because they had additional [45] expenses not present in New York City.

Q Prior to August 6, 1971, that is the date of the new regulation, is it not?

A I believe that is the date it was released.

Q Prior to that time could Nassau County put up a rent grant without recoupment?

A We had no requirement for recoupment or duplication.

Q It was a discretionary item on the part of the local district? The state would contribute no money for that?

A That is correct.

Q New York State receives Federal aid for the emergency assistance aid that they grant; is that correct?

A I believe so, yes.

Q Do you know what percent of it is the dollar for dollar Federal participation is on the FDC cases?

A Fifty-fifty.

Q Do you know whether emergency assistance participation is at a higher level—government participation?

A I would assume it is the same.

Q Could New York State grant emergency assistance to a recipient who is in need of a duplicate rent payment?

[46] A No. They could not. If you are talking about emergency assistance under the Emergency Assistance Program—if this is what you mean.

Q Yes.

A There is a system—

MR. NATHANSON: 350, Judge, of the Social Services Law.

THE WITNESS: You'd better read it. I am not too sure.

THE COURT: Suppose you show it to the witness.

MR. NATHANSON: All right. Yes.

Q Does the statute prohibit duplicate rent payments for rent grants already issued?

A This statute has nothing to do with the A.D.C. Program. Nothing at all.

Q Does New York State have an emergency system program with respect to A.D.C. cases?

A Not with respect to A.D.C. for children under twenty-one.

THE COURT: Is that different than F.D.C.?

THE WITNESS: It is the same thing.

Q Your contention is that the state has no assistance for children?

[47] A Yes, but not under emergency assistance.

Q Can children receiving a grant under A.D.C. also receive a grant of emergency?

A Under this section, no.

Q Under any section.

A Not if they are receiving a grant of A.D.C.

Q With respect to this duplicate grant under your 352.7(g)6, how does New York State treat the duplicate rent payment with respect to the reimbursement with respect to the Federal Government?

A We don't get reimbursement on that.

Q Prior to the effective date of this regulation did you submit it to HEW for approval?

A No. Our regulations are not submitted. Prior to implementation they are submitted. We file with the Secretary of State and it is incorporated in the state.

Q When was it submitted to HEW?

A Subsequent to its release.

Q Did the Department of Health, Education and Welfare approve the regulation?

A No.

Q Do you know the basis of the objections?

A I can't give you the citations, but they make no provisions for recoupment on the basis that it does reduce [48] assistance to the family.

Q The basis was that the recoupment reduced the level of assistance without showing available resources?

A Yes.

Q Has New York received any approval for this assistance from HEW?

A No.

Q This reduction or recoupment is not limited to cases where families had available resources?

A I don't understand.

Q Does your regulation limit recoupment to instances where the family had the full resources necessary to meet the state determined level of need?

A No.

THE COURT: The phrase is standard of need and level of benefit.

A There are loans and grants which, even now some cases and situations—for example, in the A.D.C., are identical with the standard of need.

Q With respect to the benefits of the A.D.C. program, they are to children?

A That is correct.

Q And have the children in any one of these instances where recoupment is mandated, are they guilty, [49] the children, of mismanagement?

A No.

Q They would be the innocent party?

A Yes.

Q Does New York State Social Service Department know the extent to which local districts are implementing this regulation?

A We are not asking for reports. There is no reporting requirement. I would say that the cases come to our attention in terms of requests for fair hearings; individual case situations.

Q How often do local districts have to submit reports to the state so they can get reimbursement for their expenditures?

A I believe the reports are quarterly. I am not involved with the physical submision, so I cannot be too factual to dates and requirements. There is a variety of reports. Some are submitted monthly.

Q Would you know what an RH-2 form is?

A Not offhand, no.

Q Does the local board have to keep records of duplicate payments?

A They are required to have it in their narrative report on the case.

[50] Q You mean the case record?

A Yes.

Q But they don't have to submit the number of cases where they found mismanagement and duplicated grants?

A I don't believe so.

Q Is there a limit on Federal participation where the payment to recipients are done in a restricted manner?

A Federal financial participation is not available in any month where restrictive payment exceeds 10 percent of the caseload.

Q How would that be known if there is no record of how or who is getting paid?

A They have to keep some records, but I couldn't answer. To be honest, I am not in the physical end of this.

Q Didn't you say on direct examination that the main basis of this regulation is to make sure that the restrictive payments don't exced the 10 percent so it wouldn't be in jeopardy of loss of Federal funds?

A I am quite certain I did not. At least I don't believe so. The main basis for the regulation was to avoid abuse and the duplication of rent and poor money [51] managing.

Q With respect to that area, can you tell me what means are available to social service districts to deal with the problem of poor management on the part of recipients?

A They can become involved with caseworkers who would help them to spend their money a little more wisely. Some direction in payment of bills. If the management is so poor they could have approved payees designated.

Q What does that mean?

A It means that with the consent of the client someone else would act for the client and receive his public assistance checks and help him manage the money to help him get through the month.

Q Anything else available to the state?

A Restrictive payments.

Q Suppose you have a family and the household head cannot manage the money and this goes on for an extended period of time—perhaps a year. Anything else?

A Designation of another grantee.

Q Such as a guardianship?

A Or a wife, grandparent.

Q Is it possible the state might commence [52] neglect proceedings?

A I cannot attest to the possibility. If there was outright neglect and a child was being misused or abused, certainly some action would have to be taken.

Q Well, then to enable the family to better their management ability these are services available to local service districts?

A If you could give me a citation in 381, I would be better able to—

Q It should be around 381.4—

A Oh, yes. That is correct.

Q With respect to that aspect, before the social service district places somebody on restricted payments, are there any standards or criteria employed to determine if this is an appropriate method of payment?

A I believe the facts of the case force that decision on the basis of the information presented to the social service person.

Q There would have to be a finding that the person in fact has mismanaged?

A Certainly.

Q With respect to your regulation, it does not require any mismanagement to be found by the district, only that there be a need for duplicate rent payments; correct?

[53] A From the language of the regulation you could make that conclusion. Are you concluding that the policy is not clear?

Q I am not drawing any conclusions.

If the Social Service District were to make a loan to a recipient to cover a need is that reimbursable under the Federal program?

A I don't know how we could make a loan.

Q Loans are not reimbursable, or not permitted?

A We could only authorize payment based on the law. Issue a monthly amount to meet one of those monthly needs.

Q You have no statistics to indicate to the Court the number of times it has been implemented and the number of people affected by it?

A No.

Q With respect to this 10 percent, is that district to district, or it is 10 percent statewide?

A No. It is district to district.

Q Do you know if Nassau County exceeds the 10 percent?

A I do not know.

Q Any district?

A Yes.

Q Specifically do you know the names of the [54] districts who have exceeded this 10 percent this year?

A There is a list, but I didn't draw the list.

MR. NATHANSON: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. GALLAGHER:

Q From your reading of this regulation is there anything that prevents making a payment for a lost cash

grant that might have been used for grant and then recouping it?

Is there anything in the language that would not allow such a procedure as followed by Nassau County in some instances?

A No; but in 352.7(g)6 there is no provision for recoupment for theft.

Q But in 352.7(g)6 it is not a mandatory payment that has to be made, but rather at the discretion of the local Social Services Department as to whether a payment could be made in such a situation?

A Yes, that is correct.

Q Let me ask you this: On a payment under 352.7 (g)6 is a payment such as that reimbursable by the state?

A No.

[55] Q Is it correct to assume that the county would get the money back by recoupment and the state doesn't really come in?

A Correct.

Q So is there any need for the county to file a report on these cases when situations under 352.7(g)6 arise? Is there anything that would require the county to tell you when they make a grant under this?

A Not to my knowledge. Of course, any case activity must be reported. Any expediture has to be reported.

Q You said something before about a narrative report that the county has to file. What is that about?

A That is the case report which is a combination. In some agencies they are separated. There is one social services report and monthly payment report. Within this file there has to be a reporting of the activity on the case.

Q On each case?

A Every case.

Q That goes to the state?

A No.

THE COURT: It is a file telling about the case.

THE WITNESS: That is correct. And it [56] is subject to review by our field people.

Q Are you aware of the fact situations involved in this case—the five people?

A No, I am not.

Q Well, in one case, under this regulation, the county attempted to recoup just about the entire amount of the advance within one month. Is there anything in 352.7 (g) 6 which would prevent them from taking it all back in one month? This is the case of Hagans.

THE COURT: In other words, recoupment was going to take almost the whole thing for six months. It had to recoup some $250.

THE WITNESS: It cannot exceed six months, and the intent was that it was to be spread to reduce the amount of decrease in subsequent checks.

MR. GALLAGHER: I have nothing further.

THE COURT: Anything further, gentlemen?

MR. GALLAGHER: No, I am through, Your Honor.

MR. NATHANSON: I have nothing further Your Honor.

MR. COLODNER: Nothing further, Your Honor.

[57] THE COURT: Both sides rest? No further witnesses?

MR. NATHANSON: I do have someone from the county. If you want some information as to how it is being implemented.

THE COURT: You tell me the specific information you expect to elicit.

MR. NATHANSON: Well, actually, I did subpoena him, but I don't think it will help, because he has no statistics. I really see no reason for him to testify.

THE COURT: I have no idea of the number of cases—

MR. GALLAGHER: On the question of how the payments were made in Nassau County before the enactment of this regulation maybe Mr. Barry could be of some help.

THE COURT: All right. Call him as a witness.

TESTIMONY OF JOSEPH BARRY

JOSEPH BARRY, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALLAGHER:

[58] Q What is your full name, please?
A Joseph Barry.
Q What is your address?
A 141 Beach Street, Valley Stream.
Q What is your position?
A I am director of the Social Services Center, Nassau County Department of Social Services.
Q How long have you been doing that type of work?
A Since 1951.
Q Are you familiar with the New York State regulation, 352.7(g)6?
A I am.
Q Under this regulation do you see any limit on what type of a—
MR. GALLAGHER: Withdrawn.
Q (Cont'g.) Has it been the policy of the local department to give assistance on grounds other than mismanagement and also with regard to recoupment of that assistance, is there any limit as far as you can see as to what grounds a person must have regarding inability to pay their rent?
A Our interpretation is that where there is to be an eviction for non-payment of rent we can make up the [59] payments, but it must be recouped over not more than a period of six months.
THE COURT: What happened when someone was evicted?
THE WITNESS: We had a growing problem in Nassau County with the growing increase of motel population. It has been within the last year that we have been

able to reduce the motel population. We are trying to keep it at that reduced amount.

THE COURT: What you did then, was you did not make duplicate payments. There was an eviction. You waited for the eviction and then these people were put up in hotels; I assume at a much higher cost—

THE WITNESS: Either that or relocating.

THE COURT: So until that point you never paid the landlord, so that tenant still owes the landlord for rent?

THE WITNESS: Many landlords will not accept a voucher payment. We have that problem that we are working with today.

BY MR. GALLAGHER:

Q Am I correct in assuming that before the [60] passage of this regulation in 1971, that if a person was unable to pay the rent, for whatever reason, there was no way that the County would pay the rent?

A That's correct. We assist the client to get other housing or utilize the community resources to meet the need of the eviction.

BY MR. NATHANSON:

Q With respect to those clients whom the County houses in motels—the county pays for the cost of that?

A That is correct.

Q Directly to the owner of the motels?

A Yes.

Q When a county does that it often is for duplicating a rent payment that has been made?

A In other words, you are saying that the client is in the motel because they didn't make rent payments? Yes. That is possible.

Q Does the State require recoupment for rent payments?

A No.

THE COURT: In other words, a recipient of a shelter allowance of $175 and who was evicted, you might take that [61] same family and pay $400 a month in a motel, but no recoupment?

THE WITNESS: That is correct.

Q I would like to ask you a question with respect to emergency assistance.

A Yes.

Q Is it available to A.D.C. cases?

A No.

Q Can a social service department under 352.7(g)6 of the regulations issue emergency assistance to meet the needs of this rent need?

A It is not maintainable.

Q Why is that?

A If I understand the regulations, this is not considered an emergency need, in accordance with that regulation and therefore cannot be met.

THE COURT: In other words, once you are in a dependent child program that is supposed to take care of the needs of those children?

THE WITNESS: That is correct.

Q Are you aware of the number of cases that are on restricted payments?

A No; I am not. That is an accounting function.

[62] Q Do you have any statistics to help the Court with the number of recipients in Nassau County who are getting this type of assistance?

A Not exact figures. I believe we had this program presented to maybe 25 or 50 persons since we implemented it, and we have no way at the present time of determining who those individuals are.

THE COURT: How many families are in the A.D.C. program in Nassau County?

THE WITNESS: Approximately 13,000.

Q How many is that in individual people?

A 39, 40,000, maybe more.

Q Do you have any knowledge of the number of A.D.C. cases statewide?

A No, I don't.

MR. NATHANSON: I have no further questions.

THE COURT: Mr. Nathanson, after you have had an opportunity to read Mr. Colodner's brief, which I read over the weekend, then let me know. As I say, I have in mind the urgency of the situation and I wish to decide

these cases quickly. I had hoped to decide [63] this case by next Monday, if I can. If I can decide it sooner, I will. As I say, I want to give either side the chance to take up the issues.

MR. NATHANSON: We did cite in our supplemental brief a case subsequent to *Dandridge*—a three judge court—same issues—and I am not sure whether or not we require additional time to brief it.

THE COURT: If you are talking about the argument in the Illinois case—I believe it is—in the latest test brief, I haven't read that because I just got that.

MR. NATHANSON: *Bradford* v. *Juras*—a three judge court, subsequent to *Dandridge*.

THE COURT: If either or any of the lawyers want to submit briefs, I suggest you call my office and say you would like a day or two. It doesn't have to be a heavy or weighty brief in ounces or pounds, just direct my attention to the cases. That is if you want additional time.

However, I don't think I can decide this before, at the very earliest, Wednesday [64] or Thursday. If you have nothing further to submit, then you may call my office and say, I have found nothing.

MR. NATHANSON: The restraining order is to continue?

THE COURT: Yes, until the filing of a decision on the merits of this trial.

Anything else?

MR. GALLAGHER: I have nothing further, Your Honor.

MR. NATHANSON: Nothing further, Your Honor.

MR. COLODNER: No, I have nothing, Your Honor.

THE COURT: All right.

Thank you, gentlemen.

IN UNITED STATES DISTRICT COURT

72-C-182

[Title Omitted]

MEMORANDUM OF DECISION

March 8, 1972

This class action challenges the validity of § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations which became effective on August 6, 1971.[1] Plaintiffs claim that the provision in the regulation directing recoupment from subsequent grants, thereby reducing the payments made to recipients, violates the recipients' constitutional right to equal protection of the laws and is violative of the provisions of § 602(a)(7) and (a)(10) of the Social Security Act (42 U.S.C. §§ 602(a)(7) and 602(a)(10) and the requirements in 45 CFR § 233.20(a) promulgated by the Secretary of Health, Education and Welfare.

Plaintiffs moved for the convening of a three judge district court. On the return day of the motion, plaintiffs withdrew the application. The parties thereupon consented to an early trial on the merits of the statutory claim by a single district judge.[2] The trial was had to

[1] § 352.7(g)(6) of the regulations promulgated by the New York State Department of Social Services provided the following: "(6) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

[2] The Court at that time issued a temporary restraining order directing payment of public assistance benefits without the deductions mandated under § 352.7(g)(6) and providing that the time limitation set forth in the said regulations be extended for the period of the stay.

the court without a jury. The parties stipulated to most of the facts at the time of trial. (See stipulation dated February 23, 1972).

Regional Commissioner of HEW, Elmer W. Smith, in answer to a plan submitted which incorporated the New York State Department of Social Services' proposed regulation which ultimately became section 352.7(g)(6), advised the defendant Wyman that "in accordance with federal policy such subsequent deductions may be taken only if such funds are available. Our reference is Federal Program regulation 20-7-Item (3)(ii)(c) and (d). As presently written regulation 352.7(g) therefore does not meet federal requirements."

The letter of December 29, 1971, written by Regional Commissioner Smith to the defendant Wyman is set out in full as follows:

"Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Western Avenue
Albany, N.Y. 12203

Re: Plan Submittal 71-68
(Standard of Assistance)

Dear Commissioner Wyman:

On November 15, 1971 we wrote you with reference to Submittal 71-61 advising that Regulation 352 g (6), cited as 352 g (7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7. We would like to bring to your attention that Submittal 71-68 continues the cited provision now in Regulation 352 g(7) and adds a new subdivision (g) 5 of Regulation 352, which has the same deficiency relative to subsequent deductions of duplicated payments.

We have noted that in these two citations restrictive payments 'may' be made of subsequent grants. Regulation 352.7 (g) (1) providing for the handling of rent payments subsequent to fraudulent claims of

non receipt of checks also indicates use of a restrictive payment. As you know, restrictive payments are not subject to Federal participation unless they fall within the Federal program guides in Regulations 20-4 and 20-5. (Protective Payments).

If it is felt that discussion of any of the foregoing is indicated, staff of the Regional Office is available.

Sincerely yours,

ELMER W. SMITH
Regional Commissioner"

The threshold question is the jurisdiction of this court to decide the statutory claim. The defendants argue that the constitutional claim is frivolous and that it, therefore, cannot be the basis for pendent jurisdiction. The court finds that the constitutional claim charging a violation of the equal protection clause of the Fourteenth Amendment is substantial. In *Bradford* v. *Juras*, 331 F. Supp. 167 (D.Ore. 1971) a three-judge district court noted that it considered both the constitutional and statutory claims in a challenge to a similar state regulation. The court decided the case on the statutory claim and did not reach the constitutional issue. *Rosado* v. *Wyman*, 397 U.S. 397, 90 S.Ct. 1207 (1970). The question as to whether a challenge to state provisions contravening the AFDC requirements of the Social Security Law based solely on the statutory claim "may be brought in federal courts." King v. Smith, 392 U.S. 309, 312, n.3, 88 S.Ct. 2128, 2131 (1968) under 28 U.S.C. § 1343(3)[3] was left

[3] "§ 1343. Civil rights

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

open. It was again noted in *Rosado* (U.S. at p. 405, n. 7, S.Ct. at p. 1214).

The AFDC Program was established in the Social security Act of 1935, 42 U.S.C. § 601, et seq. It ". . . is based on a scheme of cooperative federalism." *King* v. *Smith*, *supra*, U.S. at p. 316, S.Ct. at p. 2133. The states are not required to participate in the program but having elected to do so they "must comply with the terms of federal legislation." *Rosado* v. *Wyman*, *supra*, U.S. at p. 408, S.Ct. at p. 1216. Under the Social Security law the participating states must submit an AFDC plan for approval of the Secretary of HEW, 42 U.S.C. § 602(a)(15).

New York State participates in the Federal program of Aid to Families with Dependent Children (AFDC) as do all the other States of the Union, the District of Columbia, Puerto Rico and the Virgin Islands. New York's plan for Aid to Dependent Children (ADC) is embodied in § 131(a) of the Social Services Law of the State of New York. That statute provides for a schedule of payments to families with dependent children based on the number of individuals in the household. The standard of need is that sum of money required to sustain life, including food, clothing, utilities, furniture, household supplies, laundry, personal expenses and transportation, but exclusive of shelter and fuel. The level of benefits fixed by § 131(a) is at 90% of the statewide standard of need. The program is administered locally and in Nassau County by the Nassau County Department of Social Services.

The program is funded by grants equal to 50% from the Federal government, 25% from the State and 25% from the County. Under the regulations of the Department of Social Services (18 N.Y.C.R.R. § 352.3), each social service department fixes a maximum monthly rent allowance schedule. Both the allowance for basic needs and the allowance for rent are paid monthly in one check, except in those cases where the local social services department elects to make direct payments for rent.[4]

[4] The department of Health, Education and Welfare regulations

42 U.S.C. § 602(a)(10) requires New York State to furnish aid "to all eligible individuals". The program's aims and goals are set forth in 42 U.S.C. § 601. It encourages the maintenance of a family unit where dependent children are deprived of support and encourages the States to furnish financial assistance to such families for the "maintenance of continuing parental care and protection . . ." The need for payments at whatever level of benefit the State establishes for current use is obvious. The Secretary promulgated a regulation requiring that in establishing financial eligibility and the amount of the assistance payment, the regular payments would not be reduced because of a prior overpayment. The Rule provides in part as follows:

> "A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:
>
> * * * *
>
> (3)(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment:
>
> * * * *
>
> (c) only such net income as is actually available for current use on a regular basis will be considered; (d) current payments of assistance will not be reduced because of prior overpayment unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment; . . ." (Emphasis supplied).

The view of the Secretary concerning the interpretation and effect of its own regulation is entitled to weight. *Zemel* v. *Rusk*, 381 U.S. 1, 11, 85 S.Ct. 1271, 1278 (1965), *Rosado* v. *Wyman*, *supra*, U.S. at pp. 406-407, S.Ct. at p. 1215.

The three cases decided in other circuits concerning similar regulations were brought to the court's attention.

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discourage direct payments by limiting the number of direct payments to third parties to not more than 10% of the cases receiving payments under AFDC statewide. 45 CFR § 234.60(b)(2).

In *Cooper* v. *Laupheimer*, 316 F. Supp. 264 (E.D.Pa. 1970 and *Bradford* v. *Juras*, 331 F. Supp. 167 (D.Ore. 1971), three-judge courts found similar state regulations violative of the Social Security Act. In *Acosta* v. *Swank*, 312 F. Supp. 766 (N.D.Ill. 1970), a three-judge court came to a different result. However, on a motion to reargue the court considered a brief of HEW and was there advised that it was the opinion of the Secretary of HEW that the challenged state regulation was inconsistent with 42 U.S.C. § 602(a)(7) and 45 CFR § 233.20 (a)(3)(ii)(c). The court was further advised that the State of Illinois "changed its policy with respect to 'duplicate assistance' so as to conform with the aforesaid HEW regulation . . ." *Acosta* v. *Swank*, 318 F. Supp. 1348, 1349 (N.D.Ill. 1970). The court then remanded the case to a single district judge to determine whether the plaintiffs were entitled to 'retroactive benefits" because of the deductions made pursuant to the invalid regulation. The regulation that grants duplicate payments for rent where a recipient of AFDC assistance is threatened with eviction providing for recoupment out of current benefits is void. The court declares that 18 N.Y.C.R.R. § 352.7(g)(6) contravenes the Social Security Act and the regulations promulgated thereunder. A permanent injunction may issue enjoining the defendants from attempting to recoup such duplicate payments by reducing current AFDC payments.

This memorandum of decision contained findings of fact under Rule 52.

Settle judgment in accordance with this memorandum of decision on two days' notice.

JACOB MISHLER
U. S. D. J.

IN UNITED STATES DISTRICT COURT

72-C-182

[Title Omitted]

MEMORANDUM OF DECISION ON SETTLEMENT OF JUDGMENT

March 14, 1972

Plaintiffs and defendants submitted proposed judgments as directed in the court's memorandum of decision dated March 3, 1972. Plaintiffs' proposed judgment directs payment of all monies wrongfully withheld pursuant to § 352.7(g)(6) of Title 18 of The New York Code of Rules and Regulations. Plaintiffs' proposed judgment would make the judgment retroactive to the date of the promulgation of the invalid regulation, i.e., August 6, 1971. Defendants' proposed judgment would limit retroactivity to the date of the issuance of the temporary restraining order which directed payment of AFDC benefits without the deduction mandated by § 352.7(g)(6).[1]

The court has no information as to how many recipients are affected by this determination, either county-(Nassau County) or state-wide; it has no information as to the financial burden retroactive payments would have on the county or state.[2]

The plaintiff class is defined as all recipients of benefits under Aid to Families with Dependent Children (AFDC)[3] whose grants are threatened with reduction pursuant to § 352.7(g)(6).

AFDC was established to provide grants to *children* for current needs. It was not intended to be used as a form of damages for past deprivations. The difficulty in denying retroactivity to plaintiffs is the questionable good

[1] The T.R.O. was signed February 18, 1972. The action was commenced by the filing of a complaint on February 10, 1972.

[2] The court made inquiry on the issue during the trial. Defendants' witnesses were unable to supply the anwers.

[3] The state describes the program as Aid to Dependent Children (ADC).

faith of the state[4] in promulgating § 352.7(g)(6). The state promulgated the regulation after having been advised by the Regional Commissioner of H.E.W. that the regulation as then proposed did not meet federal requirements. However, on the other side of the ledger are varied and complex questions as to the fault of the parent in the management of the proceeds of AFDC monthly grants.[5] If the right to retroactive benefits is discretionary wtih the court as suggested in *Robinson* v. *Hackney*, 307 F.Supp. 1249, 1257 (S.D. Texas—three-judge court 1969), then the fault of the class must be considered as well as the bad faith of defendants. See also *Machado* v. *Hackney*, 299 F.Supp. 644, 646 (W.D. Tex. 1969).[6]

Three-judge courts in the District of Connecticut have directed retroactive payments to recipients of benefits under AFDC upon finding state court regulations invalid: In *Thompson* v. *Shapiro*, 270 F.Supp. 331, 338 (D.Conn. 1967),[7] the court struck down a regulation requiring a one year residence in order to qualify for AFDC benefits. The court granted judgment ". . . awarding plaintiff money unconstitutionally withheld . . . ." The affirming opinion did not discuss the issue of retroactivity. 394 U.S. 618, 89 S.Ct. 1322 (1969). In *Doe* v. *Shapiro*, 302 F.Supp. 761, 768 (D.Conn. 1969)—overturning a regulation terminating benefits upon the refusal of a mother to name a putative father—and *Solman* v. *Shapiro*, 300 F.Supp. 409 (D.Conn. 1969)—overturning a requirement that determinations of need consider the income of a stepfather—the court referred the issue of the amount of the back payment to be made to the Department of Welfare of the State of Connecticut.

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[4] *Baxter* v. *Birkins*, 311 F.Supp. 222 (D.Colo. 1970), directed retroactive effect even where the state acted in good faith in promulgating a regulation requiring a one year residence for AFDC.

[5] The named plaintiffs are without fault. Fault, however, was not an element in determining the class or exclusion from the class.

[6] *Machado* v. *Hackney* applied the determination retroactively to the named plaintiffs only, and prospectively to all the other members of the class.

[7] A dissenting opinion was written by Judge Clarie.

Westberry v. *Fisher*, 309 F.Supp. 12 (D.Me. 1970), and *Acosta* v. *Swank*, 325 F.Supp. 1157 (N.D.Ill. 1971), held that retroactivity is barred by the Eleventh Amendment. Those decisions found that the claim for retroactive payment was in fact an action by a citizen against the state for damages—an action not maintainable under the Eleventh Amendment without the consent of the state.

In *Rosado* v. *Wyman*, 322 F.Supp. 1173, 1196 (E.D. N.Y. 1970), giving prospective direction to its order, the court noted the heavy financial burden on the state if the order were retroactively applied. The financial and administrative burden was also considered in *Machado* v. *Hackney*, *supra*, and *Robinson* v. *Hackney*, *supra*.

The right of AFDC recipients is to be treated fairly and equally with other eligible recipients as provided by the Fourteenth Amendment in the distribution of government funds for the purpose of satifying the current needs. The failure of the government, either state or federal, to provide funds does not create a right of recovery. The award of funds over current needs might very well dicriminate against other recipients who receive less than current needs. The level of benefits under the ADC program is fixed at 90% of the standard of need. In balancing the equities which on the one hand takes into account the bad faith of the state, and the other hand the fault of a substantial number of the class to be benefited, the financial and administrative burdens imposed on the state and the cost which ultimately must be borne by the taxpayer, the factors weigh heavily against granting a windfall to the plaintiffs in the form of retroactivity.[8]

The court has this day signed the judgment proposed by Joseph Jaspan, County Attorney of Nassau County, attorney for the defendant James M. Shuart.

JACOB MISHLER
U. S. D. J.

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[8] As has been noted, February and March 1972 payments will be made under the T.R.O. issued on February 18, 1972. To that extent the class has received retroactive benefits as of the date of the institution of the action.

IN UNITED STATES DISTRICT COURT

72 Civ. 182

[Title Omitted]

ORDER AND JUDGMENT

This cause came on to be heard on plaintiffs' motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction enjoining the defendants from enforcing and implementing § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations and for the convening of a three-judge statutory court, pursuant to Title 28 U.S.C. §§ 2281 and 2284, and plaintiffs in open court having withdrawn their application for the convening of a three-judge statutory court; and the Court having found plaintiffs' constitutional claim under the Equal Protection Clause of the Fourteenth Amendment to be substantial; and the plaintiffs having consented to the determination of the statutory claim by the Court; and upon the consent of all the parties in open court, the hearing of the application for a preliminary injunction was advanced and consolidated with a trial of the action on the merits, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure; and the Court having given the matter due deliberation;

Upon the pleadings, affidavits and briefs submitted to date, the stipulation of the facts by the parties dated February 28, 1972, the testimony taken in open court, and the memorandum decision of the Court dated March 3, 1972, containing findings of fact pursuant to Rule 52 of the Federal Rules of Civil Procedure, this Court having found in said decision that § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations, by requiring that duplicate payments of rent for ADC recipients who are threatened with eviction be recouped by reducing current payments without regard to the current availability of income or resources, contravenes the Social Security Act and the regulations promulgated thereunder, it is

ORDERED, ADJUDGED AND DECREED that pursuant to Rule 23 of the Federal Rules of Civil Procedure, this action is properly maintainable as a class action and that the class represented by plaintiffs herein consists of all recipients of public assistance in the Aid to Dependent Children category in New York State whose grants are threatened with reduction by the implementation of § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for a permanent injunction be granted; and it is further

ORDERED, ADJUDGED AND DECREED that § 352-.7(g)(6) of Title 18 of the New York Code of Rules and Regulations is hereby declared to be in violation of the Social Security Act and the regulations promulgated thereunder by the Secretary of Health, Education and Welfare in that § 352.7(g)(6) improperly requires that duplicate payment for rent to prevent eviction of a recipient of ADC be recovered by reducing current benefits without regard to current avilability of resources or income; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, their successors in office, agents and employees, and all persons in active concert and participation with them, including local social service officials administering the Aid to Families with Dependent Children program under state supervision be, and hereby are, permanently enjoined from enforcement or implementation of § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations; and it is further

ORDERED, ADJUDGED AND DECREED that defendants reimburse all ADC recipients in the state who have had part of their grant recouped pursuant to 18 NYCRR § 352.7(g)(6) during the months of February and March, 1972, for the amount recouped during those months.

ENTER

/s/ Jacob Mishler
Judge, U. S. D. C.

March 14, 1972

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of March, one thousand nine hundred and seventy-two.

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, etc.; EURLEEN CARSON, etc. and all other persons similarly situated, PLAINTIFFS-APPELLEES

v.

GEORGE K. WYMAN, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Dept. of Social Services, DEFENDANTS-APPELLANTS

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated March 16, 1972, for a stay be and it hereby is granted.

It is further ordered that the appellants shall file their brief on or before March 27, 1972; that the appellees shall file their brief on or before March 31, 1972 and that all parties may file typewritten papers.

It is further ordered that this argument of the appeal shall be heard during the week of April 3, 1972.

A. DANIEL FUSARO
Clerk

BEFORE: HON. PAUL R. HAYS
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
Circuit Judges

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 72-1327

[Title Omitted]

OPINION AND DISSENTING OPINION OF COURT OF APPEALS

Before: CLARK, Associate Justice,* LUMBARD, Senior Circuit Judge and TYLER, District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, permanently enjoining appellants from implementation or enforcement of § 352.7(g) (7) of Title 18, New York Code of Rules and Regulations.

Order vacated and case remanded for further proceedings.

CARL JAY NATHANSON, (Nassau County Law Services Committee, Inc., Westbury, New York) for Plaintiffs-Appellees.

MICHAEL COLODNER, Asst. Atty. Gen. (Samuel A. Hirshowitz, First Asst. Atty. Gen. and Louis J. Lefkowitz, Atty. Gen., State of New York, of counsel), for Defendant-Appellant Wyman.

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* Retired Associate Justice of the Supreme Court, sitting by designation.

** Of the District Court for the Southern District of New York. Sitting by designation.

TYLER, D.J.

This is a class action in which plaintiffs-appellees challenge the validity of 18 N.Y.C.R.R. § 352.7(g)(7),[1] a regulation promulgated by the New York State Department of Social Services. Defendants-appellants, Commissioners of the New York State and Nassau County Departments of Social Services (hereinafter collectively, the "state") appeal from an order of the District Court for the Eastern District of New York which declared § 352.7(g)(7) void and enjoined defendants from implementation of enforcement thereof. We conclude that issues relating to the validity of § 352.7(g)(7) were not raised by the stipulated facts presented at trial and that the order must therefore be vacated and the case remanded for further consideration.

Prior to the enactment of the regulation in question, the state was without authority to advance funds to welfare recipients who, having mismanaged their grants, were unable to keep current in their rent payments. To prevent evictions and the resultant necessity and expense of relocations and/or housing welfare recipients in motels, § 352.7(g)(7) was enacted on August 6, 1971. This regulation authorizes the state to advance to welfare recipients faced with eviction funds to which they will become entitled in the future and with which they can pay rent currently due. To husband funds and discourage mismanagement, § 352.7(g)(7) further provides that such monies as are advanced to forestall eviction shall be deducted from subsequent grants over the following six months, recouped by the state and presumably disbursed to other welfare recipients.

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[1] The regulation in question, cited by the parties and the court below as 18 N.Y.C.R.R. § 352.(g)(6) was renumbered 18 N.Y.C.R.R. § 352.7(g)(7) effective December 10, 1971. § 352.7(g)(7) provides in pertinent part:

> "For a recipient of public assistance who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months."

The representative plaintiffs, five mothers and their twelve children, receive monthly Aid to Families with Dependent Children (AFDC) grants calculated to provide 90% of their familial sustenance needs. Each plaintiff, for various reasons,[2] was unable to pay her rent, and thus was served with an eviction notice by her landlord.

To prevent the evictions and to avoid housing plaintiffs in motels, the state paid plaintiffs' rent arrearages directly to the landlords. These sums were considered as "advances" by the state, which, pursuant to 18 N.Y.C. R.R. § 352.7(g)(7), deducted or "recouped" them from subsequent grants. Appellees complain that recoupment, which in some cases has drastically reduced their grants, penalizes their children for their parental misfeasances and thus contravenes §§ 602(a)(7) and (a)(10) of the Social Security Act, 42 U.S.C. §§ 602(a)(7) and (a)(10), and is an impermissible reduction in an AFDC grant under 45 C.F.R. § 233.20(a).

Appellees eschewed a three judge court, 29 U.S.C. § 2281, and the parties proceeded on stipulated facts to an expedited trial. Rule 65(a)(2), F.R.Civ.P. After expert testimony was heard on the policy and intent of § 352.7(g)(7), the court found jurisdiction under the equal protection clause of the Fourteenth Amendment and determined that the case was properly maintainable as a class action. The court then held [by virtue of its pendent jurisdiction of the statutory claim] that § 352.7(g)(7) violated the Social Security Act and federal regulations enacted thereunder. The state was enjoined from implementation or enforcement of the recoupment regulation and ordered to reimburse appellees for funds which had been deducted.

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[2] Cynthia Hagans paid $200 a month for her apartment while receiving $165 a month for rent. She was simply unable to make up the $35 a month difference with money allocated for other needs. Bertha Grissett was unable to pay her rent after the proceeds of her check was stolen. She apparently has had her recoupment reimbursed. Kathryn Zaverzence and Karen Horneck expended their rent money for babysitters and transportation while looking for alternative housing. Eurleen Carson mistakenly believed that her rent was being paid directly to her landlord.

Appellants' principal argument on appeal is that because appellees' right to AFDC grants is ". . . dependent for its existence upon the infringement of property rights", *Hague* v. *C.I.O.*, 307 U.S. 496, 531 (1939), jurisdiction may not be found under 28 U.S.C. § 1343(3). *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir., 1969). The Supreme Court, however, has just laid to rest ". . . the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction. *Lynch* v. *Household Finance Corp.*, —— U.S. —— (No. 70-5058, U.S. Supreme Court, March 23, 1972) slip opinion at 4. This being so, there is jurisdiction of the instant case under 28 U.S.C. § 1343(3). *Carter* v. *Stanton*, —— U.S. —— (No. 70-5082, U.S. Supreme Court, April 3, 1972); *McClendon* v. *Rosetti*, —— F.2d ——, (No. 71-1890, 2d Cir., April 12, 1972).

Nevertheless, we conclude that the case must be remanded to permit the trial court to consider certain facts and issues which, as counsel effectively conceded on oral argument, were not brought to its attention. The record, constructed on an expedited basis on stipulated facts and limited testimony, unfortunately contains only fleeting and elliptical references to "fair hearings", despite the fact that New York is constitutionally, as well as by its own regulations, required to afford welfare recipients notice and an opportunity to be heard before their benefits may be "terminated, suspended, or reduced." *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); 18 N.Y.C.R.R. § 351.26. Although there are indications that none of the named plaintiffs received hearings concerning recoupment of funds advanced to them,[3] the parties have not addressed themselves to the question of what impact, if any, the "fair hearing" mandated by 18 N.Y.C.R.R. § 351.26 might have upon New York recoupment procedures. Accordingly, there remain unconsidered issues which must

[3] Plaintiffs Hagans and Grissett neither requested nor received hearings. Mrs. Zaverzence received notice of hearing, but claims that the departmental representative refused to see her on the appointd date. Mrs. Horneck's request for a hearing was refused. It is not clear whether Mrs. Carson, who signed a consent to recoupment, received a hearing or not.

be resolved before the state may be permanently enjoined from implementing advance rent payments and enforcing recoupment thereof pursuant to § 352.7(g)(7).

The first issue which must be considered is whether notice and hearings are plaintiffs' due in this case. In order to make this determination, it must be decided whether recoupment of past advances from current grants is a "reduction in grant" so as to bring into effect New York fair hearing procedures. 18 N.Y.C.R.R. § 351.26.

If it be determined that plaintiffs have actually sustained a reduction in grant, any recoupment in the absence of notice and hearings would work a denial of due process of law to plaintiffs. *Goldberg* v. *Kelly*, *supra*. The state, in such event, would be obliged to refund recouped funds and to refrain from enforcement or implementation of 18 N.Y.C.R.R. § 352.7(g)(7) unless and until fair hearings are provided.

Until the question of fair hearings is resolved, it is premature to permanently enjoin implementation of § 357 (g)(7). Since it is not yet clear how the state will interpret or implement its recoupment regulation, there is ". . . the need for some further procedure, some further contingency of application or interpretation whether judicial, administrative or executive . . . to make [ripe] the issue sought to be presented to the Court." *Poe* v. *Ullman*, 367 U.S. 497, 528 (1961), [Harlan, J., dissenting]. Accordingly, before holding state and federal welfare regulations in conflict, ". . . the appropriate course is to withhold judicial action pending reprocessing, [under New York fair hearing procedures], of the determinations here in dispute." *Richardson* v. *Wright*, 405 U.S. 208, 209 (1972).

One other problem inherent in this litigation deserves identification and consideration. It might be argued that recoupment does not entail a "reduction in grant", since only advanced funds are deducted and thus, the grant, over a six month period, would remain constant. If the trial court were persuaded by such an argument, the state might not be under any obligation to provide hearings prior to recoupment. That conclusion would not necessarily require judgment for plaintiffs, for if one were

to assume that there was no reduction in grant entailed by New York's recoupment of rent advances, the question would remain as to whether or not § 352.7(g)(7) was in conflict with Subchapter IV of the Social Security Act, 42 U.S.C. § 601 *et seq.* See *Dandridge* v. *Williams*, 397 U.S. 471 (1970), or HEW regulations enacted thereunder.[4]

The order of the District Court is vacated and the case remanded for further consideration in light of the matters heretofore discussed.

LUMBARD, Circuit Judge (dissenting):

I dissent and vote to reverse.

I fail to understand what purpose will be served by remanding this case to the district court for its consideration whether the plaintiffs were entitled to a hearing under the rule of *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the question was whether certain individuals were eligible for welfare benefits and there were factual disputes over their eligibility. Here there are no disputed facts. The statute provides that the state may advance welfare payments and, if it does so, that it shall recoup them over a six-month period. Hearings would be necessary only if the state allowed exceptions to this rule and the plaintiffs wished to prove that they were within the excepted class. The statute permits no such exceptions.

On the merits, I think the New York statute a valid exercise of the state's power to make regulations governing the payment of welfare grants. Plaintiffs have argued that the New York statute is in conflict with 42 U.S.C. § 1302 and particularly the HEW regulation, 45 C.F.R. § 233.20(3)(ii), promulgated thereunder. However, these federal laws prescribe welfare eligibility re-

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[4] For example, 45 C.F.R. § 233.20(a)(3)(ii)(d) provides:

"current payments of assistance will not be *reduced* because of prior overpayments unless the recipient has income or resources currently available in the amount by which the agency proposed to reduce payment." [emphasis supplied]

quirements, while the New York statute is directed not at eligibility (which the state determines according to the applicable federal standards), but at the method of payment of concededly due welfare grants. Nothing in the governing federal statute bars the state from accelerating welfare payments in one month and then reducing subsequent monthly grants. To hold otherwise would mean that the state either would have to forego programs of the nature at issue in the instant case or would have to make double payment to welfare recipients who had mismanaged their grants. The first course would be inhumane; the second an improvident allocation of the state's limited resources. Neither is required by the federal law.

I would reverse the judgment of the district court and direct that judgment be entered for the defendants and that the injunction be vacated.

IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT

BARBARA SEEMILLER, being duly sworn, deposes and says:

1. That she resides at 33 New Avenue, Yonkers, New York with her child, Karin, age three.
2. That she is a recipient of Aid for Dependent Children benefits for herself and child from the Westchester County Department of Social Services and was a recipient of public assistance at all times hereinafter mentioned.
3. That the deponent rents the premises located at 33 New Avenue at a monthly rental of $130.00.
4. That deponent became in arrears of rent owed for the months of March and April, 1972.
5. That deponent had insufficient income to pay this rent arrearage and also to meet her other needs.
6. That in May, 1972, deponent requested that the Westchester County Department of Social Services pay the rent arrearage in order that deponent could retain possession of her apartment.
7. That on May 17, 1972, the Westchester County Department of Social Services advised deponent by letter that it would authorize two months back rent in the amount of $260.00. This letter also informed deponent that the money so authorized would be recouped from future grants effective July 1, 1972 through December 31, 1972 at the rate of $43.33 per month. Attached hereto and marked as deponent's exhibit A is a copy of this letter.
8. That on May 17, 1972, deponent also received from the Westchester County Department of Social Services a document entitled Notice to Reduce Public Assistance which stated deponent's public assistance grant would be reduced from $251.00 monthly to $209.70 because deponent received duplicate rent money in the amount of $260.00 to cover rent for March and April. Attached hereto and marked as deponent's exhibit B is a copy of this notice.

9. That on or about May 17, 1972, the Westchester County Department of Social Services made payment of $260.00 to deponent's landlord.

10. That on June 7, 1972 deponent requested a fair hearing of the New York State Department of Social Services to review the right of the Westchester County Department of Social Services to deduct $43.33 a month from her public assistance grant for a period of six months to recoup the duplicated rent. Attached hereto and marked as deponent's exhibit C is a copy of this request for a fair hearing.

11. That because of deponent's request for a fair hearing, no reduction of her public assistance grant was made pending the receipt of a decision in the requested fair hearing.

12. That on June 27, 1972, a fair hearing was held in White Plains, New York, at which time deponent contested the right of the Westchester County Department of Social Services to recoup the duplicated rent money from her current grant.

13. That a fair hearing decision dated July 21, 1972, upheld the right of the Westchester County Department of Social Services to recover the duplicated rent payments on the basis of authority given to it in Section 352.7 (g) (7) of the Regulations of the State Department of Social Services. Attached hereto and marked as deponent's exhibit D is a copy of this fair hearing decision.

14. That as a result of this fair hearing decision, deponent's public assistance grant for September has been reduced by $43.30, and deponent has been informed that this deduction will continue through February, 1973.

15. That unless deponent is permitted to intervene in the above captioned action, her substantial rights may be prejudiced by any decision which may be rendered and the interests of justice will not thereby be served.

WHEREFORE, deponent respectfully prays that she may be permitted to intervene in the above captioned ac-

tion and for such other and further relief as to the Court may seem just and proper.

/s/ Barbara Seemiller
BARBARA SEEMILLER

Sworn to before me this 15th day of September, 1972.

/s/ John C. Doherty
JOHN C. DOHERTY
Notary Public, State of New York
No. 60-0979305
Qualified in Westchester County
Term Expires March 30, 1973

EXHIBIT A

COUNTY OF WESTCHESTER
DEPARTMENT OF SOCIAL SERVICES

Division of Family and Child Social Services
70 Ashburton Avenue, Yonkers, N.Y. 10701

Tel. YOnkers 3-7450

EDWIN G. MICHAELIAN
County Executive

[SEAL]

LOUIS P. KURTIS
Commissioner

JOHN J. ALLEN
Director

May 17, 1972

Mrs. Barbara Siemiller
33 New Avenue
Yonkers, N.Y.

Dear Mrs. Seimiller:

This is to notify you that we have authorized two months back rent money in the amount of $260 on this day.

We will recoup this money from future grants effective July 1, 1972 through December 31, 1972 at the rate of $43.33 per month.

The check for the rent will be coming into this office. You will receive a letter requesting you to come into the office to sign the check, and we will then mail it directly to your landlord.

If you have any questions, please call me between 9:00 a.m and 12 p.m. on extension 261.

Sincerely,

/s/ L. Bloom
L. BLOOM
Unit Assistant

LB:dl

EXHIBIT B

COUNTY OF WESTCHESTER
DEPARTMENT OF SOCIAL SERVICES

Division of Family and Child Social Services
70 Ashburton Avenue, Yonkers, N.Y. 10701

Tel. YOnkers 3-7450

NOTICE OF INTENT TO REDUCE
PUBLIC ASSISTANCE

EDWIN G. MICHAELIAN
County Executive

[SEAL]

LOUIS P. KURTIS
Commissioner

JOHN J. ALLEN
Director

Mrs. Barbara Siemiller
33 New Avenue
Yonkers, N.Y.

Category and
Case No. F 171623
Date: 5/17/72

This is to advise you that this department intends to REDUCE your public assistance grant from $251 to $209.70 for the following reason(s):

For the reason that you received duplicate rent money in the amount of $260 to cover your March and April rent. The deduction will be effective 7/1/72 through 12/31/72.

You may have a conference at this department to review your case at any time before the proposed date of reduction of your grant.

/s/ L. Bloom
L. BLOOM
(Signed)

5/17/72
(Date)

RIGHT TO FAIR HEARING

If you believe that your assistance should not be reduced, you may request a state fair hearing by telephoning 212-488-3577 or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York, 12203. If you request a fair hearing, a notice will be sent to you informing you of the time and place of your hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why your assistance should not be reduced as well as an opportunity to question any persons who appear at the hearing and present evidence against you. If you request a fair hearing before the date your assistance is proposed to be reduced, you will continue to receive your assistance unchanged until the fair hearing decision is issued.

(2 copies to recipient)
(1 copy to Albany)
(1 copy to file)

PA/II—4/72

EXHIBIT C

June 7, 1972

N.Y.S. Department of Social Services
Fair Hearing Section
1450 Western Avenue
Albany, N.Y.

Gentlemen:

I am herewith making application for a Fair Hearing based on the fact that it is maintained that I received duplicate rent money of $260.00 to cover March and April rent. I have been advised that this money will be deducted from July 1-December 31, 1972 at the rate of $43.33 per month.

Please be advised that my husband was to pay this rent, under a Family Court Order, and my Landlord advised me that same was two months behind. I am faced with an Eviction Order if this is not paid. I have a 3 year old daughter to support, and if my subsistence is reduced I will be unable to support her and continue with my obligations.

My parents are not in a position financially to render any assistance. I look forward to hearing from you. They have advised me at the local office that these deductions will commence July 1st.

Sincerely,

(Mrs.) Barbara Seimiller

Enc. letters received from Social Services.

B/c Mr. Bloom

EXHIBIT D

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

BARBARA SIEMILLER

From a determination by the Westchester County Department of Social Services (hereinafter called the agency)

A fair hearing was held at White Plains, New York, on June 27, 1972, before Francis R. Buckley, Hearing Officer, at which the appellant and representatives of the agency appeared. The appeal is from a determination by the agency relating to the reduction of a grant of aid to dependent children in that the agency determined to reduce the appellant's grant to recoup a duplication of rent payments. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant and her child are recipients of public assistance under the category of aid to dependent children.

(2) On May 17, 1972 the agency determined to reduce the appellant's regularly recurring grant by $43.33 per month for six months effective July 1, 1972 through December 31, 1972 to recoup $260 advanced by the agency.

(3) The appellant's recurring grant included allowance for actual rent paid in amount of $130 per month. The appellant failed to pay her rent for the months of March and April 1972 and was in receipt of an eviction order. The agency duplicated the rental allowance for those months by a two party check with the stipulation that it would be recovered by recoupment from future grants at the rate of $43.33 per month for six months from July 1, 1972 through December 31, 1972.

(4) The agency sent a Notice of Intent to Reduce the appellant's grant on May 17, 1972. The appellant requested a fair hearing to review the agency's proposed

action on June 7, 1972. The agency was notified by the State Department of Social Services that appellant's grant must be continued without change until a fair hearing decision is issued. The agency has continued assistance unchanged to the appellant through the date of this hearing, and the agency has stated that assistance will be continued until a fair hearing decision is issued.

Section 352.7 (g) (7) of the Regulations of the State Department of Social Services provides that for a recipient of public assistance, who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent an eviction. Such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months.

The agency did advance rent, for which a grant had previously been issued, to prevent an eviction and properly determined to recover such advance.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York

July 21, 1972

/s/ Abe Lavine
ABE LAVINE
Commissioner

By /s/ Carmen Shang
CARMEN SHANG
Assistant Commissioner

IN UNITED STATES DISTRICT COURT

72 C 182

[Title Omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE AS A PLAINTIFF

ELIZABETH ELY, being duly sworn, deposes and says:

1. That I live at 1876 Straus Street, Brooklyn, New York togther with my seven minor children. For the past eight years my children and I have been receiving assistance in the Aid to Dependent Children category. We receive $348 for our basic needs (food, clothing, utilities, etc.), in addition my rent of $250 per month is presently being paid by voucher directly to the landlord.

2. In June, 1972 the landlord commenced non-payment summary proceedings against me for accumulated arrears totalling $455. The landlord obtained a final judgment for the arrears and a warrant of eviction. The New York City Department of Social Services' Williamsburg office issued a two party check payable to deponent and the landlord for the arrears. I was told to sign a consent to the agency's recoupment of the rent payment from our basic needs grant over a six month period; and I did so.

3. Sometime in June or July, I received written notice from the Department of Social Services advising me that they would reduce my grant over a six month period to recoup the $455 by taking out the sum of $74.16 each month. I requested a fair hearing before the New York State Department of Social Services. A hearing was held on or about August 3, 1972 and to date no decision has been rendered. My grant has not been reduced pending the fair hearing decision.

4. That I have been informed of this pending litigation concerning the validity of the State recoupment regulation (18 NYCRR § 352.7(g)(7) and inasmuch as

the recoupment will reduce my family's monthly basic needs grant during the recoupment period by more than 20% from $348 to $274, we are threatened with imminent harm and deprivation.

5. That I respectfully ask this Court for leave to intervene in the above captioned class action. Deponent's claim will present question of law and fact which are common to the pending class action. That deponent has been informed that the defendant State has raised the issue of mootness with respect to the named plaintiffs in the class action and unless deponent is permitted to intervene in the above caption class action, substantial rights may be affected or prejudiced by the decision rendered.

WHEREFORE, deponent in the interest of justice seeks leave to intervene in the above captioned action as a party plaintiff and such other and further relief as to this Court may seem just and proper.

/s/
ELIZABETH ELY

Duly sworn to before me this 11 day of September, 1972.

CARL JAY NATHANSON
Notary Public, State of New York
No. 24-8103025
Qualified in Kings County
Commission Expires March 30, 1973

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

ELIZABETH ELY

from a determination by the New York City Department of Social Services (hereinafter called the agency)

DECISION AFTER FAIR HEARING

A fair hearing was held at Two World Trade Center, New York, New York on August 3, 1972 before Mario Gambacorta, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the reduction of a grant of aid to dependent children in that the agency determined to reduce the appellant's grant to recoup advances made for rent payments. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant and her seven children are recipients of aid to dependent children.

(2) On June 19, 1972, the agency determined to reduce the appellant's regularly recurring grant by $74.16 per month for six months effective July 4, 1972 through January 4, 1973 to recoup $455.00 advanced by the agency.

(3) The appellant's recurring grant included an allowance for actual rent paid in the amount of $250.00 per month. The appellant failed to pay her rent during the months of March, April and May 1972 and had received an eviction order. The agency duplicated the rental allowance for part of March and all of April and part of May, 1972 with the stipulation that it would be recovered by deduction from future grants at a rate of $74.16 per month for six months from July 4, 1972 through January 4, 1973.

(4) The agency sent a Notice of Intent to Reduce appellant's grant on June 14, 1972 to be effective July 4, 1972. The appellant requested a fair hearing to review the agency's proposed action on June 28, 1972. The agency was notified by the State Department of Social Services that appellant's grant must be continued without change until a fair hearing decision is issued. The agency has continued assistance unchanged to the appellant through the date of this hearing, and the agency has stated that assistance will be continued until a fair hearing decision is issued.

Section 352.7 (g) (7) of the Regulations of the State Department of Social Services provides that for a recipient of public assistance, who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent an eviction. Such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months.

The agency did advance rent for which grants had previously been issued, to prevent an eviction and properly determined to recover such advance.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York, Oct. 6, 1972.

/s/ Abe Lavine
Commissioner

By /s/ Carmen Shang
Assistant Commissioner

IN UNITED STATES DISTRICT COURT

72 C 182

[Title Omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE AS A PLAINTIFF

BARBARA LYNCH, being duly sworn, deposes and says:

1. That I reside at 40-08 196th Street, in Queens County, New York.

2. That I am together with my two minor children, John born September 22, 1963, and Brian born June 10, 1965, recipients of public assistance from the New York City Department of Social Services in the Aid to dependent children category. We have been receiving public assistance since November, 1971 as a result of being abandoned by my husband. We presently receive a monthly grant of assistance in the sum of $299.80 of which $138.80 represents the actual rent on our apartment.

3. That in June, 1972, the refrigerator in the apartment broke and the landlord refused to repair it. The refrigerator had broken down several months earlier and the landlord at that time repaired it but refused to pay for the repairs, insisting that I do so. As a result of the refrigerators breakdown, I have been unable to keep perishable foods or shop in bulk and have been compelled to shop each day spending more for food than usual.

4. That I was unable to pay the rent for August and September, 1972 and the landlord commenced non-payment summary proceedings and obtained a final order and warrant of eviction. After I received the 72 hour's notice from the Marshal, the Long Island City office of the New York City Department of Social Services issued a duplicate rent payment for the months of August and September, 1972 in the sum of $277.60 by means of a two party check made payable to the landlord and myself. The landlord has accepted the rent and the eviction was avoided.

5. That I was advised by the New York City Department of Social Services at the time I received the duplicate rent payment, that they would recoup the $277.60 over a period of 6 months commencing September 15, 1972 and continuing until February, 1973. I was also told to sign a form consenting to this recoupment and I did so.

6. That I have been informed of this pending litigation concerning the validity of the State recoupment regulation (18 NYCRR § 352.7(g)(7) and inasmuch as the recoupment will reduce my family's monthly basic needs grant during the recoupment period by more than 20% from $161 to $127, we are threatened with imminent harm and deprivation.

7. That I respectfully ask this Court for leave to intervene in the above captioned class action. Deponent's claim will present question of law and fact which are common to the pending class action. That deponent has been informed that the defendant State has raised the issue of mootness with respect to the named plaintiffs in the class action and unless deponent is permitted to intervene in the above captioned class action, substantial rights may be affected or prejudiced by the decision rendered.

WHEREFORE, deponent in the interest of justice seeks leave to intervene in the above captioned action as a party plaintiff and such other and further relief as to this Court may seem just and proper.

/s/ Barbara Lynch
BARBARA LYNCH

Duly sworn to before me this 7 day of September, 1972.

/s/ Carl Jay Nathanson
CARL JAY NATHANSON
Notary Public, State of New York
No. 24-8103025
Qualified in Kings County
Commission Expires March 30, 1973

100

THE CITY OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

Center Q53
Address 32-20 No. Blvd. LIC

NOTICE TO CLIENT OF ADVANCEMENT OF RENT TO FORESTALL EVICTION

Case Name: Lynch Barbara

Case Number: ADC 2980878-1

Address: 40-08 - 196 St., Flushing, N. Y.

This is to advise you that in order to forestall your eviction from the above address, we are advancing the sum of $208.20 to be paid to your landlord.

Accordingly, each of your next six semi-monthly grants will be reduced by the su mof $17.35 (1/12 of advancement).

Unit or Group Supervisor	Date	Unit or Group

COPY RECEIVED

Barbara Lynch 9/5/72
Client's Signature Date

(Prepare in triplicate)
Original to client
Duplicate to Case Record.
Triplicate to Control with W 661
W 662 or W 670.

IN UNITED STATES DISTRICT COURT

[Title Omitted]

INTERVENORS' COMPLAINT

I

Intervenors, on behalf of themselves and all other persons similarly situated, seek a declaration that § 352.7 (g) (7) of Title 18 of the New York Code of Rules and Regulations as promulgated on August 6, 1971, effective August 6, 1971, is in contravention of §§ 602(a) (7) and (a) (10) of the Social Security Act; 42 U.S.C. § 602(a) (7) and (a) (10), and is an impermissible reduction of the grant under 45 CFR § 233.20(a) and of the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution.

Intervenors seek injunctive relief from any and all action taken under the aforesaid regulation to reduce or suspend their grants and those of other recipients of public assistance who are similarly situated.

II

PRELIMINARY STATEMENT

On August 6, 1971, the New York State Department of Social Services promulgated anew statewide regulation, § 352.7(g) (6) which was renumbered 18 N.Y.C. R.R. § 352.7(g) (7) effective December 10, 1971, which for the first time provided that any "advance allowances" issued to prevent eviction for nonpayment of rent for which a grant had already been issued shall be recouped and deducted in equal amounts from the regular family assistance grant during the subsequent six months. This regulation, which became effective immediately on August 6, 1971, has been applied throughout New York State to drastically reduce, over a six-month period, the monthly grants for basic needs of families who have been

threatened with eviction and required a duplicate rent payment.

The said regulation is in direct conflict with the Social Security Act's requirement in the federally aided programs of Aid to Dependent Children that aid be furnished with reasonable promptness to all eligible individuals. Specifically, said regulation inflicts a punishment upon dependent children by a drastic six-month reduction in their food, clothing and basic necessity allowance for acts or events beyond their control. Such a reduction is wholly inconsistent with the Social Security Act's requirement that eligibilty determinations be made on the basis of need less available income and resources within the statutory assistance levels established in each state, and is a further illegal circumvention of the Social Security Act's prohibition on assumed income. The dependent children in recipient families who are issued a shelter grant to prevent eviction are equally needy in subsequent months but said Regulation automatically recoups the full amount regardless of how little of the subsequent basic grants remain to satisfy the family's needs.

The said Regulation further violates the Equal Protection Clause to the Fourteenth Amendment by discriminating irrationally and invidiously between different classes of recipients, and by imposing automatic reductions of basic needs grants without any standards. The basic subsistence grant for dependent children in families who have received duplicate rent payment to prevent eviction is arbitrarily reduced or suspended for six months while dependent children with identical basic needs in families who have not received duplicate rent payments receive their full monthly allotments. No basis, consistent with the purposes of the Social Security Act and relative to the existence or extent of need, exists for this discrimination. All families with dependent children are deemed by statute to be equally needy. The dependent children in a family that has prevented eviction is not the less needy of the essentials of living in subsequent months; yet, only dependent children in families which are the victims of threatened eviction are subjected to this drastic curtailment of subsistence benefits

in violation of their right to Equal Protection of the Laws.

The harm inflicted by the automatic recoupment mandated by 18 N.Y.C.R.R. § 352.7(g)(7) is immediate, irreparable and devastating to families suddenly left for half a year with only a fraction of the funds needed for food, clothing and other basic necessities.

III

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C. § 1343 in conjunction with 28 U.S.C. § 2201 and § 2202, 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

IV

THREE JUDGE COURT

1) Intervenors seek preliminary and permanent injunctive relief from the enforcement and operation of 18 N.Y.C.R.R. § 352.7(g)(7) on the grounds of the unconstitutionality of such statewide regulation.

2) Pursuant to 28 U.S.C. § 2281, a three judge statutory court should be convened to hear and determine intervenors' claim.

V

STATEMENT OF CLAIM

1) New York operates and administers its Aid to Dependent Children program pursuant to the requirements of § 601 *et seq.* of the Social Security Act, 42 U.S.C. § 601 *et seq.*, for which it receives billions of dollars annually in federal reimbursement. Pursuant to required State Plan, and specifically 42 U.S.C. § 602(a)(23), New York has enacted in § 131-a of the Social Services Law, a statewide standard of need for all families and a con-

committant statewide schedule of monthly basic needs grants and allowances to be issued to persons determined to be needy. 18 N.Y.C.R.R. § 352.4. Such grants and allowances are designed to meet subsistence needs for food, clothing, furniture, household supplies, transportation and other personal expenses, but exclusive of shelter.

2) Shelter needs are met by a separately computed amount as determined by rent schedule promulgated in each local social services district pursuant to 18 N.Y.C.R.R. § 352.3. In all cases the rent allowance is issued in the amount of shelter expense actually paid, up to the maximums set forth in such schedule. A fuel for heating allowance is included where such expense is in fact incurred.

3) Each AFDC family receives a total public assistance grant every month comprised of the basic needs, shelter, and, if present, fuel for heating allowances. The full grant is issued every month in advance to meet that month's current needs. Unless family need, in fact, decreases, only available income and resources may be deducted on any given month to reduce the total amount.

4) On August 6, 1971, 18 N.Y.C.R.R. § 352.7(g)(6) was promulgated and made effective, providing that:

> "For a recipient of public assistance who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month or more than one rent advance in a 12-month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

The Section was later renumbered 18 N.Y.C.R.R. § 352.7(g)(7) effective December 10, 1971.

5) Any element of choice or election by the recipients affected under said regulation is illusory and coerced. Families are told by social service workers that the only way to prevent eviction into the streets and possible mo-

tels, a placement with its disruptive, devastating effects upon children, is to "consent" to accepting the "advance" to the subequent six month curtailment of basic needs. Often consent is not even sought.

6) The "advance" of rent results in no further surplus available income or resources to the recipient family since its use is restricted to payment of rent to the landlord to prevent eviction. The recoupment is mandatory and is implemented following the issuance of a duplicate rent payment. There are no exceptions permitted and no issues of fact for fair hearings.

7) Families in receipt of Aid to Dependent Children are deemed by § 131-a of the Social Services Law to have specific basic needs for food, clothing, household supplies, transportation, utilities and other essential items and the standard of need and level of payments available to meet those needs are set uniformly for all families. Under the Social Security Act the level of assistance actually granted cannot be reduced below those uniform levels unless there is available income or resources to make up the reduction deficiency. Yet, the regulation challenged herein results in drastic reductions of assistance for six months and leaves families with a small fraction of the funds needed to survive.

8) Said reduction lowers otherwise eligible families far below their correct levels of entitlements and results in denial of eligibility to persons whose income or other resources are just below welfare standards and are now, by application of this reduced eligibility standard, above such standards.

VI

INTERVENORS

1(a) Intervenors are all citizens of the United States and reside in New York State and intervened in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure as members of the class of recipients of public assistance in New York State who have been aggrieved or are threatened with irreparable implementation of 18 N.Y.C.R.R. § 352.7(g)(7).

Intervenors are members of the class of recipients of public assistance in the Aid to Dependent Children category residing in New York State whose grants have been reduced or are threatened with reduction by the implementation of § 352.7(g) (7) of Title 18 of the New York Code Rules and Regulations.

(b) Intervenors present questions of fact and law which are common to the named plaintiffs and the class they represent. The claims of the intervenors are typical of the claims of all members of the class; the intervenors can fairly and adequately represent the claims of similar members of the class; the defendants are acting on grounds generally applicable to the entire class; the questions of law and fact common to the class predominate over any questions affecting individual members, and class action will best provide for a fair and efficient adjudication of this controversy.

2. The intervenors have had their basic needs grants drastically reduced or are threatened with reduction by the implementation of 18 N.Y.C.R.R. § 352.7(g) (7).

(a) Intervenor BARBARA SEEMILLER and her two infant children are recipients of public assistance in New York State in the Aid to Dependent Children category. They reside at 33 New Avenue in Yonkers, New York. In May, 1972, Mrs. Seemiller required a duplicate rent payment in the sum of $260 to forestall an eviction. She was informed that her basic maintenance grant of $161 would be reduced to $117 for a period of six months to permit the local social services agency to recoup the duplicate rent payment. Mrs. Seemiller requested a fair hearing to challenge the recoupment. A hearing was held on July 21, 1972 and by decision dated August 2, 1972, the defendant upheld the implementation of the recoupment provision. Intervenor SEEMILLER's grant is presently being reduced to implement the recoupment regulation.

(b) Intervenor ELIZABETH ELY and her seven infant children are recipients of public assistance in New York State in the Aid to Dependent Children category and reside at 1876 Strauss Street in Brooklyn, New York. In June, 1972, she received a duplicate rent payment in the sum of $455. She was informed that the family's

basic maintenance grant would be reduced monthly over a period of six months from $348 to $274 to permit the local agency to recoup the duplicate payment. Intervenor ELY requested a fair hearing challenging the threatened recoupment. A fair hearing was held on or about August 3, 1972; to date no decision has been rendered.

(c) Intervenor BARBARA LYNCH and her two infant children are recipients of public assistance in New York State in the Aid to Dependent Children category and reside at 40-08 196th Street, Flushing, New York. They presently receive a monthly grant for basic needs in the sum of $161, together with a shelter allowance of $138.80. In August and September, 1972, the New York City Department of Social Services issued intervenor LYNCH a duplicate rent payment in the sum of $277.60 to forestall eviction after a final judgment for accumulated arrears had been obtained by her landlord. Intervenor LYNCH has been informed that effective September 15, 1972, her basic maintenance grant will be reduced monthly over a period of six months from $161 to $127 to permit the City Department of Social Services to recoup the duplicate rent payment.

VII

DEFENDANTS

1. The defendant GEORGE K. WYMAN as Commissioner of the New York State Department of Social Services, has primary responsibility for the administration of that Department in compliance with state and federal law. New York Social Services Law § 34.

VIII

AS A FIRST CAUSE OF ACTION INTERVENORS ALLEGE:

1. 18 N.Y.C.R.R. § 352.7 (g) (7) violates the Social Security Act of 1935 and the regulations promulgated thereunder in that it mandates a reduction in assistance

benefits where no additional income or resources are available to make up for the reduction.

2. 42 U.S.C. § 602 (a) (10) provides that New York, by accepting federal funds, is under a duty "that Aid to Dependent Children shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602 (a) (7) provides that a "State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to Families with Dependent Children."

3. 45 C.F.R. § 233.20(a) provides in pertinent part:

> "A State Plan for OOA, AFDC, AB, APTD, or AABD, must, as specified below:
>
> (3) (ii) Provide that, in establishing financial eligibility and the amount of the assistance payment:
>
> * * * *
>
> (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; (d) current payments of assistance will not be reduced because of prior overpayment unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment; . . . ."
>
> * * * *
>
> (viii) Provide that payment will be based on the determination of the amount of assistance needed, ..."

4. HEW, *Handbook of Public Assistance*, Part IV § 3131 provides that: "The State Plan must provide that loans made under conditions that preclude their use for meeting current living costs and that are held and used in accordance with such conditions shall not be considered available for such needs and that the sums so held and used shall not be taken into account in determining the assistance payment.

5. The United States Department of Health, Education and Welfare has not approved 18 N.Y.C.R.R. § 352.7 (g) (7).

6. Under 18 N.Y.C.R.R. § 352.7(g)(7) defendants violate the aforesaid provisions of law by reducing the monthly grants of recipients of public assistance who have received a grant to prevent eviction for non-payment of rent for which a grant had been previously issued, when no income or resources are available to compensate for or to meet the residual need caused by that reduction.

IX

AS AND FOR A SECOND CAUSE OF ACTION:

1. 18 N.Y.C.R.R. § 352.7(g)(7) in requiring the reduction of grants issued to children whose grants have been reduced because of prior payments to avoid eviction for nonpayment violates the fundamental mandate of the Social Security Act's Aid to Dependent Children program, "to enable the child's unmet need to be supplied." HEW, Handbook of Public Assistance, Part IV § 3401, and to refrain from penalizing children for the difficulties, faults or misfortunes of their parents. 42 U.S.C. § 602(a)(10).

X

AS AND FOR A THIRD CAUSE OF ACTION:

1. All persons deemed needy in New York under § 131-a of the Social Services Law have their subsistence grants determined by the schedules provided in that statute without any deductions except for available income and resources.

2. Intervenors, as persons threatened with eviction for non-payment, regardless of cause or circumstances, are singled out and forced by 18 N.Y.C.R.R. § 352.7(g)(7) to accept a drastic six month reduction in subsistence grants though no additional income or resources are available to compensate for said reduction.

3. Said regulation irrationally and invidiously discriminates against intervenors' dependent children in

families which require duplicate rent payments to avoid eviction. No basis exists in law or fact consistent with the purposes of the Social Security Act for reducing the level of payments to intervenors who are then forced to live far below the subsistence levels provided to all other persons. Said regulation applies a wholly different standard in determining the grant levels of intervenors than the standard applicable to all other persons, in violation of the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution.

XI

Intervenors have no adequate remedy at law. The implementation of 18 N.Y.C.R.R. § 352.7(g)(7) is causing, and will continue to cause, immense, irreparable and devastating harm to families with children whose basic needs of survival, food, clothing, and other essentials of life, have been drastically curtailed, unless enjoined forthwith.

WHEREFORE, intervenors respectfully pray on behalf of themselves and all others similarly situated that this Court grant the following relief:

1) That a preliminary and permanent injunction be made and entered enjoining the defendant, his successors in office, agents, employees and all other persons in active concert and participation with him from enforcing 18 N.Y.C.R.R. § 352.7(g)(7) on the grounds that said regulation violates the requirements of the federal Social Security Act, 42 U.S.C. § 602(a)(7) and (a)(10) and is an impermissable reduction in grant under 45 C.F.R. § 233.20(a) and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2) That a declaratory judgment be made and entered holding that 18 N.Y.C.R.R. § 352.7(g)(7) violates § 602(a)(7) and (a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(7) and (a)(10), 45 U.S.C. § 233.20(a) and the Due Process and Equal Protection Clauses of

the Fourteenth Amendment to the United States Constitution.

3) Allow intervenors their costs herein and grant them and all other persons similarly situated such additional or alternative relief as the Court may deem to be just and proper.

Dated: September 29, 1972

NASSAU COUNTY LAW SERVICES COMMITTEE, INC.

By: CARL JAY NATHANSON
of counsel
Attorney for Intervenors
1570 Old Country Road
Westbury, New York 11590
(516) 997-9680

IN UNITED STATES DISTRICT COURT

Docket No. 72-C-182

[Title Omitted]

MEMORANDUM OF DECISION AND ORDER

October 19, 1972

This case was remanded [462 F.2d 928 (2d Cir. 1972)] to this court to determine whether recoupment of an advance payment under 18 N.Y.C.R.R. § 352.7 (g) (7) is a reduction in grant thereby requiring a fair hearing as provided in 18 N.Y.C.R.R. § 351.26 [1] and as required under *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970).[2]

When the matter come on for hearing, application was granted (on consent) allowing the following parties to intervene as additional named plaintiffs of the class of recipients of public assistance in the Aid to Families With Dependent Children (AFDC) program whose monthly grant has been reduced or threatened with reduction through recoupment under 18 N.Y.C.R.R. § 352.7(g) (7):[3]

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[1] 18 N.Y.C.R.R. § 351.26 was repealed April 21, 1972, effective April 22, 1972 and incorporated in § 358.4. That section sets forth the grounds on which a recipient of benefits under AFDC is entitled to a fair hearing. "Reduction in Grant" is not a ground set forth in the statute. The State has advised the court that recipients affected by the recoupment provision of § 352.7(g) (7) are entitled to fair hearings under the § 358.4(a) (3) criteria of "inadequacy of amount or manner of payment of assistance."

[2] Judge Lumbard dissented and voted for reversal of the judgment in favor of the plaintiffs holding "[N]othing in the governing federal statute bars the state from accelerating welfare payments in one month, and then reducing subsequent monthly grants."

[3] The regulation was numbered § 352.7(g) (6) at the time the action was instituted and renumbered § 352.7(g) (7) as of December 10, 1971.

BARBARA SIEMILLER, for herself and her infant child, KARIN;
ELIZABETH ELY, for herself and her seven minor children;
BARBARA LYNCH, for herself and her two minor children.

Barbara Siemiller and her infant child Karin, age three, received a monthly grant of $251. The grant included a shelter allowance of $130 and the balance of the grant, i.e. $121 for basic needs. She fell in arrears for the months of March and April 1972. She was unable to pay the rent arrears and her food bills and purchase other necessities at the same time. She was threatened with eviction. She requested the Westchester County Department of Social Services to pay the rent arrears. The Department made payment and advised Mrs. Siemiller that the $260 would be recouped from monthly grants beginning in July 1, 1972 at the rate of $43.33 per month.

Mrs. Siemiller requested and received a fair hearing before the Westchester County Department of Social Services. The Department of Social Services of the State of New York affirmed that determination on July 21, 1972. Neither the County nor State Department of Social Services considered the effect the recoupment would have on the child.

Griffith v. *Wyman*, —— A.D.2d —— (1st Dept. June 19, 1972) annulled the determination of the Commissioner of the New York State Department of Social Services and remanded for a rehearing because of failure to comply with proper fair hearing procedures.[4] The court in

[4] The court heard two cases. One involved a fraudulent affidavit where the recipient under Old Age Assistance committed the fraud in stating checks representing the grant had been lost or stolen (Griffith); the other involved duplicate payment under 352.7(g)(7) to avoid threatened eviction of the recipient under the AFDC program (Boyd). Mr. Justice Steuer in dissent distinguished the cases. Referring to the AFDC program he said:

> ". . . The beneficiaries of the Act are the children. The courts have recognized that their current needs are not lessened by an overpayment in the not too recent past. Nor are they to be

Griffith said:

> ". . . it should be noted that the public assistance paid to the recipient was primarily for the support of her five children. They may not be charged with the fraud or wrongdoing of this petitioner. This factor should be a matter for consideration by the State Commissioner on a rehearing."

The Attorney General's letter of September 7, 1972 states that *Griffith* suggests that the effect of recoupment on dependent children presents a fact question in fair hearings on recoupment under § 352.7(g)(7). *Griffith* involved recoupment under § 352.7(g)(1).[5] The provisions are similar. In the case of a lost or stolen check, however, the negligence of the recipient with reference to the check will not allow recoupment of the duplicate payment. The section provides recoupment only when the recipient has practiced a fraud in endorsing and cashing a check. Under § 352.(g)(77, however, the section mandates recoupment regardless of fault.[6] Recipients

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penalized for their parents' action, illegal or even criminal. State regulations to the contrary are no bar."

[5] 18 N.Y.C.R.R. § 352.7(g)(1) provides:

(g) *Payment for services and supplies already received.* Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

(1) If a check for a grant is reported lost or stolen, an affidavit of loss shall be required of the recipient and payment of the check shall be stopped. Such check shall be replaced without delay and issuance of such replacement shall not be delayed pending further substantiation of client's affidavit. If payment cannot be stopped, the social services district shall claim State reimbursement on only one of the two checks. When it is established that a recipient endorsed and cashed an allegedly lost, stolen or undelivered check which had been replaced, subsequent grants shall be reduced over a period not on excess of six months, to provide for recoupment of such payment. Under such circumstances the allowance to meet the rent may be paid on a restricted basis during the period of recoupment.

[6] For example—Leaving an endorsed check unattended, or failing to take prudent measures to prevent theft of the monthly payments.

threatened with eviction are in default for a variety of reasons; at times it is mismanagement of the funds allotted; at times it is for reasons beyond their control.[7]

The Attorney General in a letter dated September 7, 1972 suggests that *Griffith* held that ". . . the effect on children" would be an issue to be determined in the fair hearing to determine the right to recoupment. It is noted that the Siemiller determination was made after *Griffith*. No finding was made on that issue. The pertinent section mandates recoupment if it is established that duplicate payments have been made to avoid threatened eviction. The members of the class do not seek fair hearings. The court believes that if fair hearings were afforded the members of the class, the determination would be the same as in Siemiller. The court should not require further effort involving long delays to arrive at the issue posed in this action. *Cooper* v. *Laupheimer*, 316 F. Supp. 264, 266 (E.D. Pa. 1970).

Defendants argue that 18 N.Y.C.R.R. § 352.7(g)(7) is not in conflict with 42 U.S.C. § 602(a)(7) and 45 C.F.R. § 233.20(a)(3)(ii)(c) since the Federal statute and regulation define eligibility requirements while the New York statute does nothing more than provide a convenient method of recovering the "advance allowance."[8] The argument disregards the stated statutory purpose and objective of the AFDC program, i.e.,

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[7] Cynthia Hagans received a monthly check of $326 for herself and her two infant children. Of this $165 was determined to be the shelter allowance. She was unable to find quarters at the rental allowed. She rented an apartment in Massapequa at $200 per month. The Attorney General conceded that it was difficult to find accommodations at the rental figure allowed. Mrs. Hagans accumulated a deficiency in her rental allowance so that she was unable to pay the rent of December 1971. She was evicted from her apartment in January 1972. She found a new apartment in Amityville at $175 per month. The Nassau County Department of Social Services made a duplicate rent payment from the February 1972 monthly benefit check. The February 1972 check to Mrs. Hagans for herself and her two children was $17.

[8] The *amicus* brief submitted by the Department of Health, Education & Welfare deals with defendants' argument as follows:

". . . The Act provides only for federal assistance with respect to state payments for current needs which have been deter-

> ". . . to furnish financial assistance and rehabilitation to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. 42 U.S.C. § 601."

The argument also overlooks the relationship between the parent or parents and the dependent children with relation to the benefits received. The mother, father or other relative is merely the disbursing agent of the monthly benefits. The person so appointed is selected by the State.[9] In *Cooper* v. *Laupheimer*, *supra* at p. 269, the court said:

> "The Pennsylvania regulation is inconsistent with the Social Security Act for the [same] reason . . . it punishes the child by depriving him of a substantial portion of AFDC assistance which he is eligible to receive because his mother mistakenly or fraudu-

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mined to exist in the month for which the payment is made. It does not permit accelerated payments or repayable loans, which is, effectively, the characterization which New York places upon such payments under 18 N.Y.C.R.R. 352.7(g)(7). (Page 2-3)

. . .

". . . HEW believes that while states are required to consider the individual's income and resources, they may consider those items which the recipient actually has at his disposal. Thus, HEW has consistently interpreted these sections as permitting the states to consider as available to the recipient only income and resources which are actually at the recipient's disposal in a particular month, and as disallowing states from creating presemptions of availability of income. 45 C.F.R. 233.20(a)(3)(ii)." (Page 4)

[9] 45 C.F.R. § 234.60 sets out requirements for Protective and vendor payments for dependent children in State plans. Under the section of the State may under established criteria provide for the appointment of one other than the parent where it is demonstrated that the parent is unable to manage the funds. Direct payment for food, living accommodations may also be embodied in the State plan.

lently obtained an extra payment months ago . . . the target and primary beneficiary of AFDC aid is the child; the mother is merely the conduit through which the funds are channeled to the child . . ."

Furthermore, the regulation is repugnant to the provisions of the Act in its total disregard of the concept of need. Congress established only two prerequisites for eligibility: need and dependency. *The Pennsylvania regulation must be measured against these criteria, even though it deals with reduction of aid rather than conditions of eligibility, because it was the intent of Congress that need and dependency be the only two conditions restricting of AFDC grants.* While each state is free, under the statute, to set its own standard of need and to determine the level of benefits to be administered, the Pennsylvania regulation ignores the Department's own prior determination that the family is in need and that a specified amount of semi-monthly aid must be provided to meet those needs. The regulation arbitrarily directs that the duplicate payment must be recovered by proportionate reductions in two or four consecutive payments, regardless of how little remains to satisfy the family's needs. (Underlining supplied)

18 N.Y.C.R.R. § 352.7(g)(7) contravenes 42 U.S.C. § 602(a)(7) and (a)(10) and 45 C.F.R. § 233.20(a).

The Clerk is directed to enter a judgment forthwith enjoining the defendants from attempting to recoup duplicate payments from AFDC benefit payments as mandated under 18 N.Y.C.R.R. § 352.7(g)(7) and directing repayment of all sums deducted from AFDC benefit payments on and after October 1, 1972.

The judgment is stayed for five days to afford defendants an opportunity to apply to the Circuit Court of Appeals for the Second Circuit for a further stay pending appeal.

U. S. D. J.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(No. 1 10-26-72)

72-8171

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and seventy-two.

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY AND KOREY; *et al.* PLAINTIFFS-APPELLEES

v.

GEORGE K. WYMAN, as Commissioner of the New York State Dept. of Social Services, *et al.*
DEFENDANTS-APPELLANTS

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated October 20, 1972, for a stay pending appeal be and it hereby is granted.

It is further ordered that all parties may file their papers in typewritten form and the appellants shall file their brief and joint appendix on or before November 8, 1972; that appellee shall file its brief on or before November 15, 1972; that the appeal shall be set for argument promptly thereafter.

A. DANIEL FUSARO,
Clerk

* * * *

BEFORE: HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILLIAM H. MULLIGAN,

Circuit Judges

Nov. 2, 1972

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title Omitted]

OPINION OF COURT OF APPEALS

BEFORE:

FRIENDLY,
Ch. J.,

WATERMAN AND HAYS,
C.J.J.

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, permanently enjoining the enforcement or implementation of Section 352.7(g)(7) of Title 18 of the New York Code of Rules and Regulations, which permitted the state to recoup advances for rent from subsequent grants under the Aid to Dependent Children Program. Remanded to dismiss for want of jurisdiction.

MICHAEL COLODNER, Assistant Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), for Appellants.

CARL JAY NATHANSON, Hempstead, New York, for Appellees.

HAYS, Circuit Judge:

The State of New York appeals from an order of the United States District Court for the Eastern District of New York permanently enjoining the enforcement or implementation of Section 352.7(g)(7) of Title 18 of the

New York Code of Rules and Regulations,[1] a regulation permitting the state to recoup advance payments for rent from subsequent grants under the Aid to Dependent Children Program (ADC). In issuing the injunction the District Court held that the New York regulation violated the Social Security Act, 42 U.S.C. § 601 et seq., and the regulations promulgated thereunder. We find that the District Court did not have jurisdiction to reach the pendent statutory claim because no substantial constitutional claim was presented by the facts of this case. We therefore remand the case with instructions to dismiss for want of jurisdiction.

The plaintiffs in this action are all recipients of aid under the ADC Program. Under this program the plaintiffs receive monthly grants to pay for shelter, fuel, and other necessities. The plaintiffs spent the portion of the grant designated for shelter for some other purpose and were therefore unable to pay their rent. When they were threatened with eviction, the New York State Department of Social Services paid their rent and deducted the amount advanced from later grants made under the ADC Program. Plaintiffs objected to the recoupment, claiming that the regulation authorizing the recoupment violated the equal protection clause of the 14th Amendment and contravened the provisions of the Social Security Act, 42 U.S.C. § 601 et seq. and the regulations promulgated thereunder. The District Court agreed with

[1] 18 NYCRR 352.7(g)(7) states as follows:

"(g) *Payment for services and supplies already received.* Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

* * * *

"(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title".

plaintiffs' second contention and found that 18 NYCRR 352.7(g)(7) violated the Social Security Act and the regulations promulgated under the Act, and permanently enjoined the enforcement of the regulation. This court granted a stay of the District Court's order and set an expedited appeal schedule. The case was argued on April 7, 1972, and the stay was continued pending the decision of the panel. On June 15, 1972 this Court vacated the order of the District Court and remanded the case to determine whether under the state procedure plaintiffs were entitled to a notice and hearing. With the consent of the parties, hearings on remand were adjourned until October 6, 1972. At this time, plaintiffs moved to permit certain additional persons to intervene as plaintiffs. Several of these intervenors had had state hearings.[2] On October 19th, the District Court again permanently enjoined the enforcement of 18 NYCRR § 362.7 (g)(7). This court stayed the injunction for the second time and heard oral argument on November 30.

Plaintiffs advance 28 U.S.C. § 1343(3) as the primary basis for jurisdiction in this case.[3] This section provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citi-

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[2] The five original plaintiffs had never requested hearings.

[3] Plaintiffs also assert 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983 as bases for jurisdiction. However, it is well settled that 28 U.S.C. §§ 2201 and 2202, providing for declaratory judgments, cannot be used as a basis for jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). Section 1983 is implemented by Section 1343, and no separate jurisdictional claim can be advanced on the basis of § 1983 alone. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972). See Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 Colum. L. Rev. 1404, 1407 (1973).

> zens or of all persons within the jurisdiction of the United States".

To establish jurisdiction under this statute, a substantial constitutional claim must be advanced. E.g., *Almenares* v. *Wyman*, 453 F.2d 1075, 1082 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972). Plaintiffs clearly fail to meet this standard.

Plaintiffs claim that they were denied equal protection of the laws because the recoupment of advances resulted in a lower grant of assistance than that available to other welfare recipients.

Dandridge v. *Williams*, 397 U.S. 471, 485 (1970) provides the guidelines for evaluating equal protection claims in social welfare cases.

> "A statutory discrimiantion will not be set aside if any state of facts reasonably may be conceived to justify it." (Quoting *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961)).

The regulation in question, 18 NYCRR § 352.7(g)(7), has a rational basis. Since the state has a limited amount of funds available to allocate to welfare recipients, the recoupment regulation is reasonably designed to ensure that there are sufficient funds available to all recipients on the level set by the state legislature. By receiving the advance payment plaintiffs have gotten more than the normal grant. Without the recoupment regulation, the plaintiffs would be in a preferred position over all the other welfare recipients who have paid their full rent out of the normal grant. The purposes of equal protection are served by treating all alike without granting special favor to those who have misappropriated their rent allowance. If there were no recoupment provision, there would be a disincentive for welfare recipients to manage their grants so as to have funds available to pay their rent each month. The recoupment provision encourages proper money management, an entirely acceptable, if incidental, purpose of the welfare legislation.

No doubt there are other ways in which the state could accomplish the ends served by the use of the recoupment

regulation. However, it is not for us to evaluate the wisdom of the state's choice of means. If these means are rationally related to a proper end, as they are in this case, we have no power to go further.

Because no substantial constitutional claim was presented, the district court was without jurisdiction to consider the statutory claim urged by plaintiffs. We therefore remand this case with instructions to dismiss for want of jurisdiction.

SUPREME COURT OF THE UNITED STATES

No. 72-6476

CYNTHIA HAGANS, ET AL., PETITIONERS

v.

ABE LAVINE, Commissioner of New York State Department of Social Services, ET AL.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the said motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 11, 1973

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